SUPREME COURT OF THE

OCTOBER TERM,

No. [illegible]

ST. LOUIS H.S. AND GRAIN COMPANY, APPELLANT,

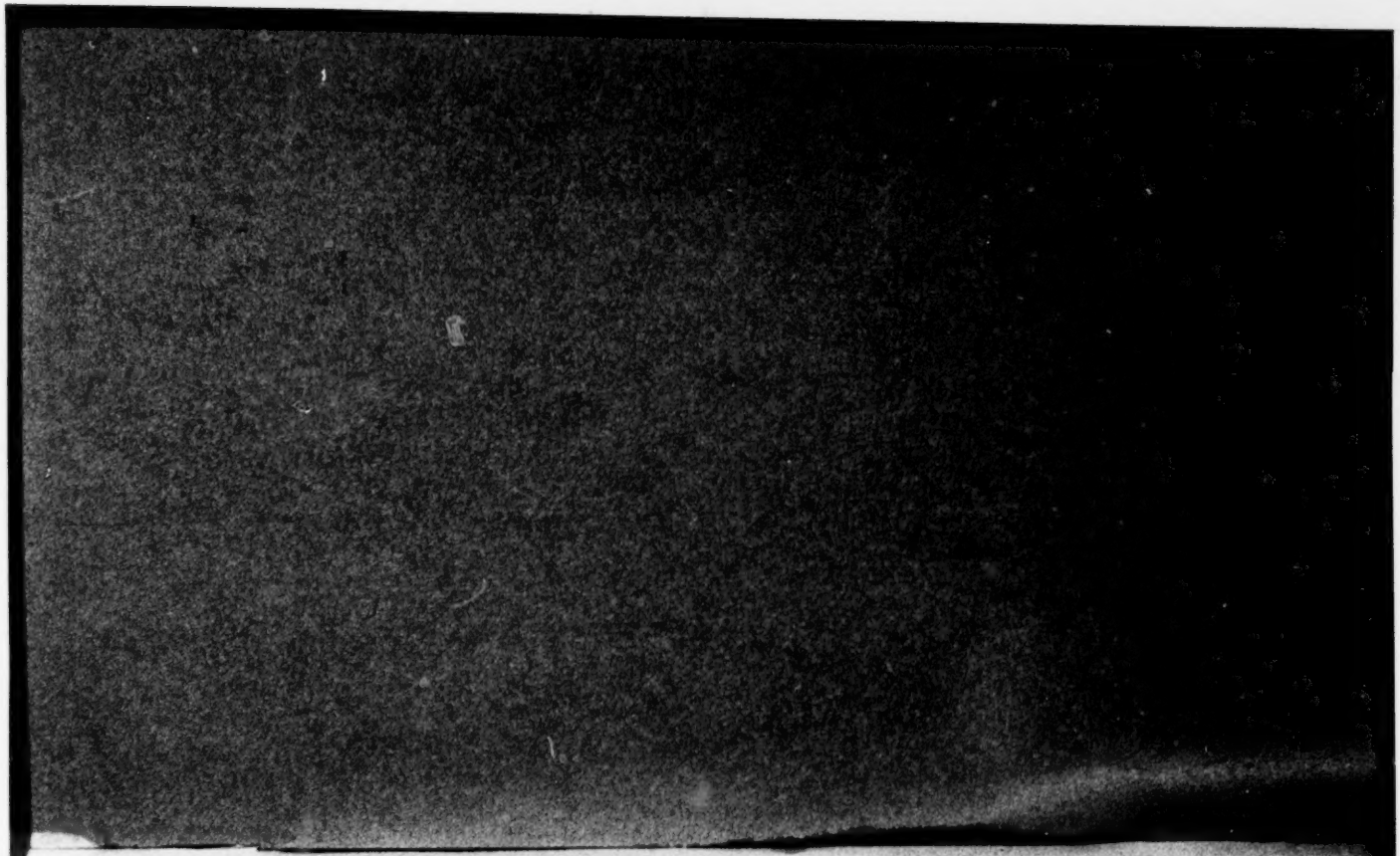
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL [illegible], 1898.

(18,497.)



(18,497.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 644.

ST. LOUIS HAY AND GRAIN COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	6	4
Amended findings of fact	7	4
Conclusion of law	19	13
Opinion	20	13
Judgment	22	16
Application for and allowance of appeal	23	16
Clerk's certificate	24	16

Judd & Detweiler, Printers, Washington, D. C., April 15, 1902.

1 Court of Claims.

ST. LOUIS HAY AND GRAIN COMPANY (a Corporation)
vs.
THE UNITED STATES. } No. 22453.

I.—*Petition.*

(Filed January 18, 1901.)

To the honorable the Court of Claims:

The claimant, St. Louis Hay & Grain Co., respectfully represents:

I. That it is a corporation duly organized and doing business under the laws of the State of Illinois, having its principal office of business at 315 Merchants' exchange, in the city of St. Louis, State of Missouri.

II. That on June 25, 1898, Col. J. G. C. Lee, deputy quartermaster general, U. S. A., issued an advertisement calling for proposals, in part as follows:

"*Proposals for Forage and Straw.*

CAMP GEORGE H. THOMAS, GA., *June* 25, 1898.

Sealed proposals in duplicate, will be received here until eleven o'clock a. m., July 11, 1898, for supply of 7,000,000 pounds oats, 5,000,000 pounds bran, 9,000,000 pounds baled hay and 1,000,000 pounds baled straw, to be delivered, as required, f. o. b. cars
2 at Battlefield station, Ga. Particulars and blank forms of proposals can be obtained of

J. G. C. LEE,
Chief Quartermaster.

"The following information is furnished in connection with the foregoing advertisement:

* * * * * * *

"5. Deliveries of the supplies to begin within five days from the date of award, and proceed at daily rates of at least one-sixtieth of amounts, or in such quantities as may be designated by the chief quartermaster, or his authorized representative, free on board cars at Battlefield R. R. station, Ga."

That claimant on the 11th day of July, 1898, submitted proposals in due form to furnish 9,000,000 pounds of hay in accordance with the provisions of said advertisement, at the rate of sixty-one and one-half cents per hundredweight; that when the proposals for hay were opened, Col. J. G. C. Lee verbally notified claimant and other bidders that at least eight or ten cars per day would be required, as there were about fourteen thousand head of stock on hand; should the shipments fall off the Government would purchase in the open market and charge the amount to the account of the contractor; that the contractor must be prepared to fill the con-

tract in ninety days. The proposal submitted by claimant was accepted by the defendant through its agent, Col. J. G. C. Lee, chief quartermaster, in a written acceptance dated the 12th day of July, 1898, whereby a contract was created between the parties.

III. Claimant thereupon immediately proceeded to fulfill and carry out its obligation under said contract, and on July 21, 1898, made its first shipment of hay and continued shipments, as follows:

3

July 21 to 31	45 cars.....	1,002,316 pounds
During August	152 cars.....	3,383,633 pounds
During September	37 cars.....	911,710 pounds
During October	17 cars.....	402,225 pounds
During November	13 cars.....	333,802 pounds
During December	No cars.....	
During January	3 cars.....	67,800 pounds
During February	28 cars.....	670,505 pounds
During March	17 cars.....	407,608 pounds
During April	15 cars.....	359,980 pounds
During May	29 cars.....	700,290 pounds
During June	(Estimated).....	504,840 pounds
		8,744,709 pounds

IV. That on August 28, 1898, claimant received a telegraph order from Captain D. E. McCarthy, depot quartermaster at Camp Thomas, as follows: "Do not ship any more hay until notified to do so." Whereupon, shipments were suspended and were never resumed at daily rates of one-sixtieth of the amount in accordance with the contract. But from time to time between August 28, 1898 and June 30, 1899, claimant was required, under penalty of having hay purchased in open market and charged to its account, to furnish hay on telegraphic or other orders from the quartermaster, and it furnished hay, as stated in the preceding paragraph. At the time the shipments under the contract were stopped August 28, 1898, claimant had in transit and in railroad yards about one hundred car-loads of hay intended for delivery under the contract during the first half of September. In consequence of the refusal of the Government to take this hay and of the great expense which it would have entailed upon claimant to have stored it, waiting for the Government to permit shipment, it was required to dispose of the hay in the general market to its disadvantage and to its

4 loss. That thereafter claimant had to buy in the open market, as best it might, hay as required by the military authorities and that hay so purchased cost the claimant on an average of $2.50 per ton more than it would have cost it had it been permitted to complete its contract in accordance with the terms of the contract. That owing to the increased freight charges it cost claimant on an average $1.00 per ton more to deliver the hay than it would have cost it had the deliveries been made as contemplated by the con-

tract at the time claimant had special arrangements with the railroad companies for transportation.

Had the claimant been permitted to fill its contract during the months of July, August and September, as it would have done had the contract for the delivery of at least one-sixtieth of the amount daily been carried out, it could have delivered hay at Battlefield railroad station a- $11.80 per ton, cost price. The average cost after the stoppage on August 28, 1898, was $15.30 per ton, for which it has been paid at the rate of sixty-one and one-half cents per hundredweight, or $12.30 per ton.

V. That by reason of the refusal of the defendant to accept one-sixtieth of the amount contracted for daily, the contract was broken and the claimant has been damaged, as follows:

Increased cost price of 2174 tons at $2.5.0	$5,435 00
Increased cost of transportation of 2174 tons at $1	2,174 00
Anticipated profits on 2174 tons at 50 cents	1,087 00
	$8,696 00

That the total amount contracted for was 9,000,000 pounds of hay, of which the Government accepted and paid for 8,744,709 pounds, leaving a balance of 255,291 pounds contracted for but not accepted by the defendant, on which the claimant claims as its anticipated profits of 50 cents on each ton, $63.80.

Wherefore claimant claims damages on the 2,174 tons delivered in the sum of $8,696, and on 255,291 pounds not delivered, $63.80, a total of $8,759.80, or for the market value of 2,174 tons of hay, delivered to the defendant for its use, less the amount paid by defendant, and accepted under protest.

VI. That a claim was presented to the auditor for the War Department and was by him disallowed on the 15th day of January, 1900, on the ground that the claim was one for unliquidated damages, which the accounting officers have no authority to allow. The Comptroller of the Treasury affirmed this decision on the grounds stated.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant prays judgment in the sum of eight thousand, seven hundred and fifty-nine and $\frac{80}{100}$ dollars ($8,759.80).

GEORGE A. & WM. B. KING,
Attorneys for Claimants.

WM. E. HARVEY, *Of Counsel.*

Frederick Deibel being duly sworn, deposes and says: I am the president and treasurer of the claimant company in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information and belief.

FREDERICK DEIBEL.

Subscribed and sworn to before me this 12th day of January, 1901.

[SEAL.]

H. W. KROEGER,
Notary Public.

6 II.—*Traverse. Filed November* 5, 1901.

ST. LOUIS HAY AND GRAIN COMPANY
vs.
UNITED STATES. } No. 22453.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.
W.

7 III.—*Amended Findings of Fact and Conclusions of Law. Filed February* 17, 1902.

ST. LOUIS HAY & GRAIN COMPANY
vs.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact:

I.

The following advertisement was published on the day of its date:

Proposals for Forage and Straw.

CAMP GEO. H. THOMAS, GA., *June* 25, 1898.

Sealed proposals in duplicate will be received here until 11 o'clock a. m., July 11, 1898, for supplying 7,000,000 pounds of oats, 500,000 pounds bran, 9,000,000 pounds baled hay, and 1,000,000 pounds baled straw, to be delivered as required f. o. b. cars at Battlefield station, Ga. Particulars and blank forms of proposal can be obtained of

J. G. C. LEE,
Chief Quartermaster.

The following information was furnished in connection with the foregoing advertisement:

8 1. The estimate quantity of forage and straw required are as follows:

9,000,000 pounds of hay.

2. The foregoing are the estimated quantities which will be required, but bids will be accepted in whole or in part and awards made accordingly, and awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof, should the interest of the public service demand such change; that in case of change of the quantities required by increase or decrease, notice of such change will be served on the bidder by the chief quartermaster; and, further, that if the troops shall be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction.

Hay and straw.

3. To be of the best merchantable quality of the highest recognized commercial grade of the locality, free from dust and other foreign matter, and to be put up in bales, each securely bound with three wires, and containing not to exceed 250 pounds net. Rate per 100 pounds net to be stated.

4. Deliveries of the supplies to begin within five days from date of award, and proceed at daily rates of at least one-sixtieth of amounts, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster or his authorized representative, free on board cars at Battlefield, R. R. station, Ga.

5. Proposals are required in duplicate.

6. Porposals for any class of the supplies mentioned or for quantities less than the whole required will be entertained, but the Government reserves the right to reject or accept the whole or any part of a bid, and to make award for either kind of supplies or such proportion thereof as may be considered for the best interest of the service.

9 7. The supplies will be subject to the inspection and acceptance or rejection of such inspector or inspectors as may be selected by the Government.

8. The successful bidders shall be responsible for and pay all liabilities for labor and material in the fulfillment of any awards made to them.

9. In case of failure of the bidder to furnish and deliver the supplies awarded to him, the said bidder shall be charged with all expenses resulting from such failure.

10. Bidders are invited to be present at the opening of the proposals.

Envelopes containing proposals should be marked "Proposals for forage and straw," and addressed to the undersigned, at Lytle, P. O., Ga.

J. G. C. LEE,
Assistant Quartermaster General,
U. S. Army, Chief Quartermaster.

In response to this advertisement a number of bidders submitted proposals. That of the St. Louis Hay and Grain Company, the claimant in this case, a corporation having its principal office in the city of St. Louis, Missouri, was as follows:

"Col. J. G. C. Lee, chief quartermaster.

SIR: In accordance with the above advertisement, inviting proposals for military supplies, and subject to all the conditions thereof, we propose to furnish and deliver at Battlefield Sta., Ga., the articles below specified, at the prices set opposite each article.

ST. LOUIS HAY & GRAIN CO.,
Per FRED DEIBEL, *Pres't.*

Nine million pounds of hay (9,000,000) (61½) sixty-one & ½ pr. 100 lbs."

The proposals were opened, as stated in the advertisement, at the office of the depot quartermaster, Chickamauga Park, Geor-
10 gia, in the presence of Col. J. G. C. Lee and a large number of bidders.

Col. Lee stated on that occasion that the party that received this contract would have to be prepared to have the goods ready and ship immediately, as they had a very large number of animals, and that the required amount as stated in the proposal would be used up each day, and that the hay must be of the quality stated in the proposal.

The bid of the claimant, so far as it related to hay, was accepted as follows:

Headquarters first army corps and Camp Geo. H. Thomas, chief quartermaster's office.

CHICKAMAUGA PARK, GA., *July* 12, 1898.

The St. Louis Hay and Grain Co., Saint Louis, Mo.

GENTLEMEN: Your proposal opened July 11, 1898, for supplying 9,000,000 pounds of baled hay at Battlefield, Ga., at 61½ cents per 100 pounds, is accepted.

Deliveries are to be made as prescribed in my circular to bidders of June 25th last, on which your proposal was based, and the hay must be of the quality stated in said circular, copy of which is inclosed herewith for your information and guidance.

The hay will be called for, inspected, received, and paid for by the depot quartermaster, Battlefield, Ga., at present Captain D. E. McCarthy, assistant quartermaster, U. S. Army, and all consignments should be made to him.

Very respectfully,

J. G. C. LEE,
Col. and Ass't Quartermaster Gen'l,
U. S. A., Chief Quartermaster.

Upon ascertaining that the claimant was the successful bidder Col. Lee stated to the president of the company that Capt. D. E.

McCarthy, depot quartermaster, would do the ordering, and
11 referred him (the president of the company) to said Captain McCarthy for directions as to the exact amount that would be wanted daily.

Thereupon the president of the company called on said Captain McCarthy, who gave him verbal orders to have not less than 8 nor more than 10 cars on the track daily.

The minimum car-load of hay was of 20,000 pounds weight, and thus eight car-loads would have amounted to 160,000 pounds.

There were about 12,000 animals at Chickamauga Park at the time.

III.

Immediately upon the acceptance of the claimant's proposal its officers arranged by telegraph with their correspondents that the hay would be shipped from points in the immediate vicinity of its production, mostly in the States of Indiana and Illinois, direct to Chickamauga Park.

By shipping in this manner the claimant could purchase more economically than in the St. Louis market, and was also enabled to obviate much of the expense incident to handling and switching the cars which would be incurred at St. Louis, and to save in transportation, which cost less from these points than from St. Louis.

Shipments were made in this way by the 27th of August, 1898, hay had been delivered by the claimant and accepted by the United States, as follows:

	Pounds.
Prior to July 25, 1898, various shipments made on an earlier contract for two millions (2,000,000) pounds, and supplied by the quartermaster on the transactions involved in the present claim.....	421,921
Between July 25, and July 30, twenty-six (26) cars, containing.....	580,395
Between August 1 and August 27, one hundred and seventy-two (172) cars, containing.....	3,683,633
Being a total to that date of..... ..	4,685,949

12 or more than half the amount provided in the advertisement, proposal and acceptance.

The following telegram was sent by the depot quartermaster and received by the claimant on the day of its date:

"CHICKAMAUGA NAT'L PARK, GA., *Aug. 28th.*

St. Louis Hay and Grain Co., No. 315 Merchants' exchange, St. Louis, Mo.:

Do not ship any more hay until notified to do so.

McCARTHY,
Quartermaster."

On the date of this telegram the claimant had 100 or more cars in transit to Chickamauga Park, which it was obliged to dispose of in

different markets throughout the country for what price it could get.

(J. R.) This hay had cost the claimant various prices, from $6 to $7.50 a ton, being from 30 cents to 37½ cents a hundredweight. The cost of the shipment of the same from the points of its production would not have exceeded 25 cents a hundredweight.

The claimant was ready and willing to proceed with shipments at a rate practically identical with that at which it had been delivering, in which event it would have completed the delivery of the entire 9,000,000 pounds by the close of September, 1898, and at the price named in its proposal would have sustained no loss.

Upon the receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments. The quartermaster, however, would not at that time accept any more hay.

IV.

On the 12th of September, 1898, and at various dates thereafter to May 18, 1899, the depot quartermaster at Chickamauga Park sent telegrams to the claimant at St. Louis, as follows:

13 September 12. Send twelve car-loads of hay at once.

September 19. Please send at once ten car-loads of hay.

September 23. Ship at once fifteen car-loads of hay.

October 5. Ship at once twenty car-loads hay.

November 10. Please ship at once ten car-loads of hay.

January 20. Please ship at once three cars of hay.

February 3. Ship at once thirty car-loads hay. Answer.

March 21. Send more hay; use more than car-load per day; keep us supplied.

March 23. Only four days' hay on hand. Unless you supply me will purchase in open market at your expense. This is the third and last call. Follow cars with wire so there will be no delay.

May 18. Hay supply short, rush forward eight cars.

The replies of claimant, so far as exhibited to the court by either party were as follows:

December 2, 1898.

If you are in a position to send us an order for some more hay on our contract, we will be glad to hear from you by wire, as we are in very good position to forward same promptly.

December 10, 1898.

If you can favor us with an order next week for 15 or 20 cars of hay on our contract, we will appreciate the same, as we are in position to move it promptly.

December 14, 1898.

If there is any indication of your wanting a number of cars on our contract, we would like to hear from you by wire, as we have quite a number of cars on the track that we will have to place in other

markets if we do not hear from you, and possibly might be delayed in getting cars when your order would come in, so hope you can advise us.

14 December 29, 1898.

If it is possible for you to advise us about how much more hay you will expect to use during the coming week or month on our contract with you we would like to know, as from the present conditions of market it looks like there is going to be considerable of an advance, and we *not* not know how much more hay you will want; and we cannot afford to take any chances on high prices for the next thirty or sixty days, unless we are protected by getting the hay for the order now, and we do not know how much you will need or want.

January 31, 1899.

We would appreciate very much if you can arrange to send us up a voucher covering all the cars sent you up to date, namely, (enumerating nine cars), and if you will soon be in need of a few more cars of hay would like to know a few days ahead of time, because the receipts of hay are very light on the markets now.

February 3, 1899.

Wire received for 30 cars hay. Will give prompt attention.

March 23, 1899.

Need not worry. Hay on way. Will rush. Tracers following.

April 13, 1899.

Replying to your favor of the 11th instant, advising us that you have rejected Sou. car 9803, and L. & N. 11048 hay on account of not being up to grade called for in our contract, you will kindly instruct your representative to have these cars delivered to J. P. McCall & Company on their order, which they will present to you, as we have instructed them to make disposition of the cars, so that they will be out of your way.

April 13, 1899.

Your favor of the 11th instant to hand, asking us to reduce our shipments of hay to your depot one-third after April 13, which is satisfactory, and we will be governed accordingly.

15 April 27, 1899.

We beg to return to you today, under separate cover, voucher duly signed according to your request, covering hay on our contract, amounting to $1,842.76, trusting you will forward us a check promptly by return mail.

May 1, 1899.

Your favor of the 28th instant to hand, advising that we are short on delivery of hay, which we will look into and have ample sent

you at once. * * * We inclose you invoice covering hay forwarded you today on our contract which we trust will be satisfactory. We assure you you need not go on the open market to purchase any needs, as we will have hay with you all the time.

May 19, 1899.

Your wire received and contents duly noted, advising that supply of hay is running short and asking us to rush forward 8 car-loads of hay. We will have the 8 car-loads loaded just as fast as we possibly can. We now inclose original bill of lading and invoice on 2 cars hay forwarded today, and will instruct railroad company to trace and rush through so there will be no delay in delivery. You can depend upon it that we will keep you supplied with hay. We have not received our check covering the last voucher that we signed and sent down to you last week, and we will appreciate very much if you will return by next mail.

May 27, 1899.

Inclosed we hand you original bill of lading on Baltimore and Ohio cars and invoice ordered upon our contract today, which we trust will arrive promptly. We will have more cars loaded next week and forward to you.

June 15, 1899.

Your favor of the 13th instant at hand and contents duly noted, advising us that on account of temporary reduction of stock at your depot you wish us to stop shipments of hay until you tell us otherwise. We will do as you request, but we are extremely anxious to clean up the old contract.

16 June 24, 1899.

* * * We would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up.

The claimant made deliveries of hay substantially to the amounts called for in said telegrams, and the same were accepted by the depot quartermaster at Chickamauga Park as follows:

	Pounds.
Between September 12 and September 30, thirty-seven (37) cars, containing	711,710
Between October 5 and November 1, seventeen (17) cars, containing	402,225
Between November 1 and November 28, thirteen (13) cars, containing	333,820
In December, none forwarded.	
January 20, 1899, three (3) cars, containing	67,800
Between February 3 and February 22, 1899, twenty-eight (28) cars, containing	670,505
Between March 22 and March 30, 1899, seventeen (17) cars, containing	407,680

Between April 5 and April 29, 1899, fifteen (15) cars, containing	359,980
Between May 1 and May 31, 1899, twenty-eight (28) cars, containing	700,290
Between June 1 and June 13, 1899, seven (7) cars, containing	160,480
Total	3,814,490
Making together with the	4,685,949
Pounds delivered prior to August 28	8,500,439

Owing to the manner in which the orders were given and the season of the year, the claimant was unable to buy at points near the places of production, as it had done during the summer of 1898, and ship thence to Chickamauga Park, Georgia, but had to purchase the hay on the St. Louis market at the current market price
17 in that city, and ship the same from St. Louis to Chickamauga Park, Georgia, and also had to pay the full rate of transportation between these points, twenty-nine (29) cents a hundredweight, besides charges for rehandling and switching. Hay is an article varying greatly in price at different seasons of the year, and gets much higher as the autumn and winter go on, and reaches its maximum about the close of the spring months.

Between the 28th of August, 1898, when shipments were stopped by the telegram hereinbefore quoted, and the month of June, 1899, when the last of the hay was delivered, hay rose in price, from $7.50 a ton to $11.50 a ton, delivered free on board the track at St. Louis. In this way the hay delivered after the 12th of September, 1898, cost the claimant an amount considerably in excess of what it would have cost them in the summer, and in excess of the price of 61½ cents a hundredweight,—the rate at which they have been paid for the same.

Payments were always held back from the claimant by the quartermaster and an amount due to claimant was always in the hands of the quartermaster as security to compel it to deliver as required.

The claimant before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant while objecting did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in finding I. Full payment was made by the defendants according to the terms of the aforesaid agreement and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made.

18

V.

The cost to the claimant of the hay delivered after the 12th September, 1898, exceeded the price it received for the same by $7,869.

The cost of the 4,685,949 pounds of hay delivered by the claimant under the agreement aforesaid prior to September 12, 1898, including the cost of transportation of the same, was $27,211.53. The difference between this cost and the amount received by the claimant for said hay is $1,607.37. The last payment was received by the claimant from the United States, July 24, 1899.

VI.

The claim was submitted to the quartermaster general, under date of May 11, 1899, as follows:

St. Louis Hay and Grain Co.

ST. LOUIS, MO., *May* 11, 1899.

Capt. D. E. McCarthy, depot quartermaster, Battlefield Sta., Ga.

DEAR SIR: We beg to enclose you our claim against Government for $4,600.00 covering loss we sustained in filling our contract at Chickamauga Nat. Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day, and all papers pertaining to our contract *is* attached. We desire to say the writer had a personal interview with Col. C. P. Miller at Washington, D. C., of the quartermaster general's department, and he advised us to file our claim through you to them with all necessary papers giving evidence of the justness of our claim. We believe everything is attached properly, as required. We have acted in good faith with you in filling this contract against our verbal protest through the writer to you that we were losing money and that Government should not require us to complete contract. But you so advised us you would go into open market and buy for our account and charge us difference, and we attach your telegram and letter so con-

19 firming. It bears consideration that when we are compelled to complete our contract with Government under prolonged term of contract for their option, and in direct violation of their proposal, agreement, and estimate at time contract was awarded us, that we are entitled to recourse and to be reimbursed.

With full knowledge you have on this entire contract, we trust that you can see your way clear to treat us justly and recommend our claim.

Yours, very truly,

ST. LOUIS HAY AND GRAIN CO.
FRED DEIBEL, *Pres.*

And the depot quartermaster reported thereon, under date of June 28, 1899, as follows:

"It would seem but just that this firm's claim should be approved, after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them."

And again, at a later date, as follows:

"Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors.

"At that time there were about 12,000 animals at the camp at Chickamauga Park, but in August and September the camp was practically broken up.

"The contractors continued to supply us with hay until July, '99, and in the meantime, especially during the winter months, hay had advanced in price, so that it seemed but just that some recompensation should be made to the contractors."

The claim, however, was not allowed on the ground that it was one for unliquidated damages, of which the accounting officers have no jurisdiction.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover and the petition should be dismissed.

BY THE COURT.

20 IV.—*Opinion of the Court.*

NOTT, Ch. J., delivered the opinion of the court.

The ultimate facts of the case are these:

1. The officers of the quartermaster's department entered into an agreement with the claimant for the sale and delivery of hay. "The estimated quantity" was 9,000,000 pounds. The quantity might "be increased or decreased at the option of the United States, not exceeding 20 per centum thereof." Should "the troops be wholly or in part withdrawn" from the camp at Chickamauga Park, "the award"—that is to say, the agreement—was to "become inoperative to the extent of such reduction." Deliveries were to begin within five days "and proceed at daily rates of at least one-sixtieth of amount, or in such quantities and at such times afterwards as may be designated by the chief quartermaster or his authorized representative." In case of failure "to furnish and deliver the supplies" the contractor was to "be charged with all expense resulting from such failure."

2. Under and in pursuance of this agreement the officers of the quartermaster's department called for and the claimant delivered 4,685,949 pounds of hay between the 12th of July and the 28th of August, 1898; that is to say, within the first forty-seven days after the agreement went into effect. The depot quartermaster—*i. e.*, the officer charged with the business at the camp—then stopped further deliveries; the claimant, by its officers, remonstrated against this. Fifteen days later, on the 12th of September, the quartermaster in charge resumed issuing orders for the delivery of hay, but in relatively small quantities; and these orders continued until June, 1899, so that between September 12, 1898, and June 13, 1899, the claimant was required to deliver and did deliver 3,814,490 pounds. The claimant remonstrated against being compelled so to deliver,

and represented that the price of hay had seriously risen, and that the change of delivery from summer and autumn to winter and spring greatly increased the freight charges upon the hay, which were to be borne by the claimant. Nevertheless the officer in charge compelled the claimant to deliver when called upon. This compulsion consisted in withholding money due for hay and threatening to purchase in the open market at the cost of the contractor. The suspension of orders for the delivery of hay and the diminished and protracted orders for delivery given by the depot quartermaster in charge were consequent to the removal of troops from the camp at Chickamauga Park and the decreased number of animals there requiring forage.

3. The agreement before referred to consisted of the advertisement of the chief quartermaster of Camp George H. Thomas, at Chickamauga Park, where the hay was to be delivered, of the proposals of the contractor and the acceptance of the proposals by the chief quartermaster. Beyond this the agreement was never reduced to writing and signed by the contracting parties, as prescribed by Revised Statutes, section 3744.

4. The claimant remonstrated against the suspension of deliveries in August, 1898, and against being compelled to deliver, as before set forth, after the price of hay had risen and the purchase of hay could not be made in the country, but had to be made in St. Louis, throwing upon it additional cost and increased freight charges, but did not treat the contract as rescinded or refuse to deliver. Payments for all deliveries were made by the officers of the quartermaster's department upon the usual vouchers as for hay delivered under the agreement, and the claimant receipted therefor without protest or reservation made at the time of payment. The losses suffered by the claimant upon hay delivered after the 12th of September, 1898, exceeded the price it received by $7,869.

21 As to the agreement, which is relied upon by the claimant, its intent and meaning do not seem as clear to the court as to the claimant's counsel. Deliveries were to begin within five days, and "proceed at daily rates of at least one-sixtieth of the amount, or in such quantities and at such times afterwards as may be designated by the chief quartermaster or his authorized representative." The provision that deliveries were "to begin within five days from date of award and proceed at daily rates of at least one-sixtieth of the total amount," standing by itself, would cast a reciprocal obligation upon the defendants to receive one-sixtieth daily if tendered, under the decision of the Supreme Court in *Speed's case* (8 Wall., 77). But this clause is qualified immediately by the words "in such quantities and at such times as may be designated by the chief quartermaster or his authorized representative." Furthermore, the agreement previously provides that "if the troops shall be wholly or in part withdrawn the award shall become inoperative to the extent of such reduction." The troops were withdrawn. Did the agreement become "inoperative to the extent of such reduction," *i. e.*, was the total quantity of 9,000,000 pounds of hay to be reduced in proportion to the diminishing number of ani-

mals remaining in the camp, and were the deliveries to be daily until the reduced total of the hay was delivered, or had the quartermaster the right to hold the claimant for the full amount of 9,000,000 pounds and stretch the period for deliveries over many months? In a word, did the claimant agree to deliver as much hay as might be required within a reasonable time, or bind itself to furnish 9,000,000 pounds of hay at Chickamauga Park as slowly or as rapidly as the military exigencies there might require and take the chances of its contract extending over the whole period of the war?

As to the agreement itself the court is constrained to hold, under the leading case of *Clark v. United States* (95 U. S. R., 539), and many decisions since, that the transaction between the parties was not a purchase in open market under the pressure of a military exigency, and that the agreement not being in writing and signed by the parties, as required by the Revised Statutes, section 3744, was not a valid contract upon which an action can be brought for damages caused by the defendants' breach.

As to the right of the claimant to recover, irrespective of the express contract, what the hay was actually worth at the time and place of delivery, the court is again constrained to hold that the claimant cannot recover. It is true that, under the authority cited, a party whose contract is for this statutory reason invalid and void may recover *in quantum meruit*; and it is true that, where there is an express valid contract, payment by a debtor of a part of his debt is not satisfaction of the whole, even though a receipt in full be given. (*United States v. Bostwick*, 94 U. S. R., 53.) But nevertheless it has been uniformly held by this court since *Kirkham & Brown* (4 C. Cls. R., 223) that in cases of implied contract where the recovery will be *in quantum meruit* and the price to be paid is undetermined by agreement, where the defendant has paid and the contractor has accepted a price as payment in full, it closes the transaction, and the contractor cannot come in and be allowed to allege that his goods were worth more than the price which he consented to take for them. (*Comstock's case*, 9 C. Cls. R., 141.) Acceptance of a smaller sum than the one claimed does not leave the defendants open to further claim, if the acceptance of the smaller sum was voluntary, without intimidation, and with full knowledge of all the circumstances. (*Savage v. United States*, 92 U. S. R., 382.)

The counsel for the claimant has warmly pressed upon the court the fact that the failure to reduce the contract to writing, as required by the statute, was the failure and default of the officers of the Government; that the claimant did everything in its power to make a complete and valid agreement, and that the defense which would preclude a party from recovering damages under the contract if it was valid, or *in quantum meruit* if it was valid, is grossly inequitable.

It must be acknowledged that this case belongs to that class which has been termed by many courts "hard cases," and that the hardness of it was caused by officers of the Government neglecting their statutory duty (Revised Statutes, sec. 3746), and that the claimant being

ignorant of the law might well rely upon the officers of the Government to reduce the contract to a legal form.

The court is aware that citizens of the United States transact their business generally under State laws, and are not familiar with acts of Congrss, and might well rely in such matters upon the knowledge and good faith of the officers of the Government. But these facts cannot validate that which is declared by statute to be invalid. Ignorance of law does not change the law.

The judgment of the court is that the petition be dismissed.

22

V.—*Judgment of the Court.*

ST. LOUIS HAY AND GRAIN COMPANY
v.
UNITED STATES. } No. 22453.

At a Court of Claims held in the city of Washington on the 17th day of February, 1902, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge, and decree that the petition of the claimant, The St. Louis Hay and Grain Company, be dismissed.

BY THE COURT.

23

VI.—*Application for and Allowance of Appeal.*

ST. LOUIS HAY AND GRAIN COMPANY
vs.
UNITED STATES. } No. 22453.

Now comes the claimant, The St. Louis Hay and Grain Company, and appeals to the Supreme Court of the United States from the judgment of this court, entered on the 17th day of February, 1902, dismissing its petition, and moves for an allowance of this appeal.

GEORGE A. AND WILLIAM B. KING,
Attorneys for Claimant.

Filed April 7, 1902.

Ordered, that this appeal be allowed as prayed for.

April 7, 1902. BY THE COURT.

24

Court of Claims.

THE ST. LOUIS HAY AND GRAIN COMPANY
vs.
THE UNITED STATES. } No. 22453.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof, I hereunto set my hand and affix the seal of said Court of Claims, this 14th day of April, 1902.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,497. Court of Claims. Term No. 644. St. Louis Hay and Grain Company, appellant, *vs.* The United States. Filed April 14th, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE SAINT LOUIS HAY AND GRAIN COMPANY, *Appellant*, v. THE UNITED STATES. } No. 305.

BRIEF FOR APPELLANT.

I. STATEMENT OF THE CASE.

The Claim.

This is a claim for a balance claimed to be due on a large quantity of hay sold and delivered by the claimant company to the United States. The case is reported below, 37 C. Cls. 281.

The findings of fact, made by the Court of Claims (record, pp. 4–13), may be summarized as follows:

Advertisement for Hay.

On the 25th of June, 1898, at the height of military operations during the war with Spain, Colonel J. G. C. Lee, Assistant Quartermaster-General, United States Army, Chief Quartermaster First Army Corps, published, at Camp George H. Thomas, Georgia, an advertisement, calling for proposals to be received up to July 11 following, for supplying nine million pounds of baled hay, besides a large quantity of oats, bran, and straw, to be delivered free on board cars, at Battlefield Railroad Station, Georgia. (Record, p. 4.)

Certain information was furnished in connection with the advertisement, among which are the following paragraphs:

"2. The foregoing are the estimated quantities which will be required, but bids will be accepted in whole or in part and awards made accordingly, and awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof, should the interest of the public service demand such change; that in case of change of the quantities required by increase or decrease, notice of such change will be served on the bidder by the chief quartermaster; and, further, that if the troops shall be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction.

"4. Deliveries of the supplies to begin within five days from date of award, and proceed at daily rates of at least one-sixtieth of amounts, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster or his authorized representative, free on board cars at Battlefield R. R. Station, Ga.

"9. In case of failure of the bidder to furnish and deliver the supplies awarded to him, the said bidder shall be charged with all expense resulting from such failure." (Record, p. 5.)

Proposal.

A number of bidders submitted proposals. The claimant in this case, a corporation having its principal office at St. Louis, Missouri, submitted a written proposal to furnish nine million pounds of hay, at sixty-one and a half cents per hundred pounds.

The proposals were opened at the office of the depot quartermaster, Chickamauga Park, Georgia, in the presence of Col. J. G. C. Lee and a large number of bidders.

Col. Lee stated on that occasion that the party that received this contract would have to be prepared to have

the goods ready and ship immediately, as they had a very large number of animals, and that the required amount as stated in the proposal would be used up each day, and that the hay must be of the quality stated in the proposal (p. 6).

Acceptance.

July 12, 1898, Col. Lee accepted the claimant's proposal in writing, stating that deliveries were to be made as prescribed in the circular advertising for proposals, and informing the claimant that the hay would be inspected, received, and paid for by Captain D. E. McCarthy, Assistant Quartermaster, U. S. Army, the depot quartermaster at Battlefield R. R. Station, Ga., to whom all consignments were to be made. Col. Lee also verbally referred the president of the claimant company to the depot quartermaster, Captain McCarthy, for directions as to the exact amount that would be wanted daily (pp. 6, 7).

Thereupon the president of the company called on said Captain McCarthy, who gave him verbal orders to have not less than 8 nor more than 10 cars on the track daily.

The minimum carload of hay was of 20,000 pounds weight, and thus eight carloads would have amounted to 160,000 pounds.

There were about 12,000 animals at Chickamauga Park at the time. (Finding II, Record, p. 7.)

Deliveries during Summer of 1898.

Immediately upon the acceptance of the claimant's proposal its officers arranged by telegraph with their correspondents that the hay would be shipped from points in the immediate vicinity of its production, mostly in the States of Indiana and Illinois, direct to Chickamauga Park. (Finding III, p. 7.)

By shipping in this manner the claimant could purchase more economically than in the St. Louis market,

and was also enabled to obviate much of the expense incident to handling and switching the cars which would be incurred at St. Louis, and to save in transportation, which cost less from these points than from St. Louis.

Shipments were made in this way until by the 27th of August, 1898, hay had been delivered by the claimant and accepted by the United States, to the amount of 4,685,949 pounds, or more than half the amount provided in the advertisement, proposal, and acceptance.

On the 28th of August, Captain McCarthy telegraphed the claimant, "Do not ship any more hay until notified to do so" (p. 7).

At that date the claimant had one hundred or more cars in transit to Chickamauga Park, which it was obliged to dispose of in different markets throughout the country for what price it could get. This hay had cost the claimant various prices, from $6 to $7.50 a ton, being from 30 cents to 37½ cents a hundredweight. The cost of the shipment of the same from the points of its production would not have exceeded 25 cents a hundredweight.

The claimant was ready and willing to proceed with shipments at a rate practically identical with that at which it had been delivering, in which event it would have completed the delivery of the entire 9,000,000 pounds by the close of September, 1898, and at the price named in its proposal would have sustained no loss.

Upon the receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments. The quartermaster, however, would not at that time accept any more hay. (Finding III, p. 8.)

Deliveries, September, 1898, to June, 1899.

On the 12th of September, 1898, the depot quartermaster, at Chickamauga Park, telegraphed to the claim-

ant, at St. Louis, "Send twelve car loads of hay at once." From this date to the 13th of June, 1899, there were a number of calls by the depot quartermaster upon the claimant for hay. The telegrams ordering the hay (p. 8) and the replies of the claimant thereto are contained in Finding IV, pp. 8–10.

Every order was complied with until, between the 12th of September, 1898, and the 13th of June, 1899, 3,814,490 pounds were delivered, making, together with the 4,685,949 pounds delivered prior to August 28, 1898, a total of 8,500,439 pounds, delivered by the claimant and accepted by the officers of the United States.

Increased Cost of Hay.

Owing to the manner in which the orders were given and the season of the year, the claimant was unable to buy at points near the places of production, as it had done during the summer of 1898, and ship thence to Chickamauga Park, Georgia, but had to purchase the hay on the St. Louis market at the current market price in that city, and ship the same from St. Louis to Chickamauga Park, Georgia, and also had to pay the full rate of transportation between these points, twenty-nine (29) cents a hundredweight, besides charges for rehandling and switching. Hay is an article varying greatly in price at different seasons of the year, and gets much higher as the autumn and winter go on, and reaches its maximum about the close of the spring months (p. 11).

Between the 28th of August, 1898, when shipments were stopped by the telegram hereinbefore quoted, and the month of June, 1899, when the last of the hay was delivered, hay rose in price from $7.50 a ton to $11.50 a ton, delivered free on board the track at St. Louis. In this way the hay delivered after the 12th of September, 1898, cost the claimant an amount considerably in excess

of what it would have cost them in the summer, and in excess of the price of 61½ cents a hundredweight,—the rate at which they have been paid for the same (p. 11).

Payments Held Back.

Payments were always held back from the claimant by the quartermaster and an amount due to claimant was always in the hands of the quartermaster as security to compel it to deliver as required (p. 11).

Protest.

The claimant before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant while objecting did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in finding I (p. 11).

Payment, How Made.

Full payment was made by the defendants according to the terms of the aforesaid agreement and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made. (Finding IV, p. 11.)

Last Payment July 24, 1899.

The last payment was received by the claimant from the United States July 24, 1899. (Finding V, p. 12.)

Claim, May 11, 1899. — Report and Action.

On the 11th of May, 1899, a letter was written to Captain McCarthy, the depot quartermaster, making claim against the Government for loss sustained, in which it was stated that the writer, the president of the company, had had a personal interview with Col. C. P. Miller, of the Quartermaster-General's Office, at Washington, who had advised him to file their claim through him—the depot quartermaster.

The depot quartermaster reported thereon, under date of June 28, 1899, as follows:

"It would seem but just that this firm's claim should be approved, after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them."

And again, at a later date, as follows:

"Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors.

"At that time there were about 12,000 animals at the camp at Chickamauga Park, but in August and September the camp was practically broken up.

"The contractors continued to supply us with hay until July, '99, and in the meantime, especially during the winter months, hay had advanced in price, so that it seems but just that some recompensation should be made to the contractors."

The claim, however, was not allowed on the ground that it was one for unliquidated damages, of which the accounting officers have no jurisdiction. (Finding VI, rec. pp. 12, 13.)

Difference Between Cost and Amount Received.

The cost to the claimant of the hay delivered after the 12th of September, 1898, exceeded the price it received for the same by $7,869.

The cost of the 4,685,949 pounds of hay delivered by the claimant under the agreement aforesaid prior to September 12, 1898, including the cost of transportation of the same, was $27,211.53. The difference between this cost and the amount received by the claimant for said hay is $1,607.37. (Finding V, p. 12.)

Opinion of Court of Claims.

The Court of Claims, in its opinion, delivered by Chief Justice Nott (rec. pp. 13–16), held as follows (p. 15):

1. "That the agreement not being in writing and signed by the parties, as required by the Revised Statutes, section 3744, was not a valid contract upon which an action can be brought for damages caused by the defendant's breach."

2. "As to the right of the claimant to recover, irrespective of the express contract, what the hay was actually worth at the time and place of delivery, the court is again constrained to hold that the claimant can not recover."

3. "That in cases of implied contract where the recovery will be *in quantum meruit* and the price to be paid is undetermined by agreement, where the defendant has paid and the contractor has accepted a price as payment in full, it closes the transaction, and the contractor can not come in and be allowed to allege that his goods were worth more than the price which he consented to take for them."

Judgment and Appeal.

Judgment was entered dismissing the petition (p. 16).

From this judgment the claimant appealed (p. 16).

II. ASSIGNMENT OF ERRORS.

The appellant hereby assigns the following errors in the opinion and judgment of the Court of Claims:

1. That said court held that the claimant was not en-

titled to recover the actual value of the hay at the time and place of its delivery, less the amount already received for the same; whereas, said court should have held that the claimant was entitled to recover the actual value of the goods sold and delivered, less the amount already paid to and received by it.

2. That said court erred in dismissing the petition of the claimant.

III. BRIEF OF ARGUMENT.

Government Contracts—R. S. §§ 3709, 3744.

The Revised Statutes contain the following provisions relative to government contracts:

"SEC. 3709. All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

"SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to ob-

tain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

No Formal Contract.

The provisions of the former of these sections were strictly complied with. There was a public advertisement, there were proposals by the claimant and other bidders, and there was a written acceptance of the claimant's proposal. Here the proceedings stopped. No formal contract, as required by section 3744, was signed. What was the effect of the failure to sign such a contract upon the rights of the parties?

As held by the Court of Claims, no binding contract between the parties was created by the advertisement, the proposal, and the acceptance. The transaction was not consummated, because it was not reduced to writing and signed by the contracting parties with their names at the end thereof, as required by section 3744.

Decisions on Failure to Sign Contract.

In the case of *Clark* v. *United States* (95 U. S. 539), this court considered the act, originally passed in 1862, now forming, in substance, section 3744 of the Revised Statutes and held as follows (p. 542):

"Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for

contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect."

And in the subsequent case of *South Boston Iron Company* v. *United States* (118 U. S. 37), where there was a written proposal, addressed to the Secretary of the Navy, and a written acceptance thereof by the Secretary, this court held (p. 42):

"An effort has been made in this case to show a contract in writing, but we agree entirely with the Court of of Claims that the papers relied on for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and, therefore, the United States never became bound. Within a very few days after the memoranda were made the whole matter was abandoned by the Department, and the Iron Company has neither performed any of the work which was referred to, nor has it ever been called on to do so."

Legal Status of Accepted Proposal.

It must be admitted, therefore, that the Court of Claims was right in holding that, notwithstanding the duty of preparing the contract for execution was that of the Secretary of War, and, although that duty was neglected

by his department, the government is not liable upon the advertisement, proposal, and acceptance as upon an executory contract. If the case ended with these papers there would be no claim. If the department had repudiated the transaction and had notified the claimant that no hay would be required under its proposal and the acceptance thereof by the Chief Quartermaster of the First Army Corps, the claimant could not recover, even for its expenses in preparing to carry out the contract. (*Monroe* v. *United States*, 184 U. S. 524.)

But the case does not end there. The claimant delivered hay whenever it was called upon to do so and, by the 27th of August, 1898, had delivered more than half of the 9,000,000 pounds called for by the advertisement. All this hay has been paid for at the rate named in the proposal and acceptance. If deliveries had continued "at daily rates of at least one-sixtieth of amounts," as provided in paragraph 4 of the circular of advertisement (p. 5), the court finds that "at the price named in its proposal it would have sustained no loss" (p. 8).

The whole claim arises out of deliveries of hay made between the 12th of September, 1898, and the 13th of June, 1899. This period includes each of the four seasons and amounts to three-quarters of the entire year. During this time the depot quartermaster called upon the claimant to furnish hay in varying quantities at irregular intervals. Every order received prompt attention. It was filled with the utmost promptness consistent with the season of the year and the state of the market.

The case depends upon the two following conditions of fact and law:

1. An advertisement, proposal, and acceptance calling for hay in certain quantities to be delivered within a particular time and to be paid for at a specified price. This

transaction never reached the form of a complete valid contract and is, by the decisions of this court, null and void.

2. A subsequent delivery of hay by the claimant to the United States, accepted by its officers for public use. For the first part of this hay the claimant has received an amount only slightly above its cost and not more than its market value. For the latter part the claimant has received an amount not only less than its market value but less than what it actually cost the claimant. The reason for the great difference between the actual cost of the hay to the claimant and the price it has received from the government lies in the fact that "hay is an article varying greatly in price at different seasons of the year, and gets much higher as the autumn and winter go on, and reaches its maximum about the close of the spring months." (Finding IV, p. 11.)

An Implied Contract for Reasonable Value.

What are the rights and liabilities of the parties arising from the delivery of hay by the claimant and its acceptance by the officers of the United States without any valid written contract, but under circumstances showing a benefit to the government in obtaining needed food supplies for the animals of the army? This question is answered by the same case of *Clark* v. *United States* (95 U. S. 539), previously quoted. After showing in the passage before quoted that a contract not signed with the formalities required by law is void, the opinion goes on (p. 542):

"We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover

such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract."

And, after discussing the special circumstances of the case, the conclusion is reached (p. 543):

"Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which, as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other. The cases bearing on this subject are collected in Browne's Treatise on the Statute of Frauds, sects. 117–130; but they mostly refer to the question whether the contract, though void by the Statute of Frauds, can be regarded as conclusive evidence of the *quantum meruit*. Whether or not it is admissible as some evidence, though not conclusive on either party, is apparently not much discussed; though it seems to us that it may fairly be deduced from the tenor of the cases that the evidence is admissible. At all events, that is our view. As a declaration of the parties, it is entitled to some credence."

According to this view the claimant is entitled to recover the value of the hay at the time and place of delivery. If there were no other finding on the subject, the rate stated in the proposal and acceptance might be presumed to be the actual value and the claimant could recover no more. But the findings show that after the proposal and acceptance were signed the value of hay rose very greatly. It "gets much higher as the autumn

and winter go on and reaches its maximum about the close of the spring months" (p. 11). These seasons coincided with the calls of the Quartermaster's Department for delivery of hay. A considerable part of that called for subsequent to the resumption of shipments on the 12th of September, 1898, was called for during the autumn. In December there were no calls or deliveries, and in January only a small one late in the month. By far the greatest part of the hay delivered after the resumption was in February, March, April, and May, 1899. This is precisely the time of the year at which hay attains its maximum value. It is for this reason that the claimant sustained such a great loss by having to deliver, in the late winter and the spring, hay which it had been led to expect would be required in the late summer and early autumn.

If the price of hay had fallen in the market instead of rising, the claimant, having no valid executory contract, could not recover the price named in its accepted proposal, but would be limited to the market value of the article at the time of delivery. It is equally entitled to demand that market price when it happens to be greater than that named in its accepted proposal.

Special Contract Void for All Purposes.

The effect of the decision of the Court of Claims is to treat the special contract as void in its restriction of the time of deliveries to "proceed at daily rates of at least one-sixtieth of amounts" (p. 5), but to give it effect as limiting the price to be paid for the goods, even though delivered afterwards. But the contract can not be void for one purpose and valid for another. In the *Clark case*, hereinbefore quoted, it is held, as to a void contract introduced as evidence of the *quantum meruit*, "As a declaration of the parties, it is entitled to some credence" (95

U. S. 543). In this case sufficient weight is accorded to the proposal and acceptance, void as a contract, by treating it as a declaration of the parties as to the market value of hay at the time the proposal and acceptance were signed. Beyond that it is of no force. As to future deliveries, it neither binds the government to pay that price nor limits the claimant to the recovery of that price.

In *Filor* v. *United States* (9 Wall. 45, 48), this court said of an agreement between a citizen and an army officer, void for want of proper approval but under which property was delivered, "The agreement or lease was, so far as the government is concerned, the work of strangers. The obligation of the government for the use of the property is exactly what it would have been if the possession had been taken and held without the existence of the agreement."

The view that a special contract can not be set up for one purpose while treated as a nullity for another, is well illustrated by the case of *Williams* v. *Bemis*, 108 Mass. 91. There the plaintiff by a verbal agreement was to cultivate the defendant's land for two years for a share of the crop,—both parties understanding that the crop would be larger in the second year than in the first. This contract was void by the statute of frauds. At the end of the first year the defendant paid the plaintiff his share of that year's crop, but refused to let him cultivate for the second year. It was held that the plaintiff might maintain an action for work done and materials furnished in cultivating the land. It was said in the course of the opinion (pp. 92, 93):

"'The true principle is this: the contract being void and incapable of enforcement in a court of law,' (the defendant having refused to perform it), 'the party paying the money, or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money or value of the services under the common counts.'

King v. *Brown*, 2 Hill, 485, 487, per Nelson, C. J. In *Gray* v. *Hill*, Ry. and Mood. 420, Best, C. J., held that where the defendant, in consideration of certain repairs to be made by the plaintiff, agreed to assign a lease to him, and after the repairs were made refused to make the assignment, and set up the statute of frauds as a defense, the law implied a promise to pay for the repairs, and this implied promise was 'not touched by the statute.' See also *Van Deusen* v. *Blum*, 18 Pick. 229.

"The defendant insists that the work was done by the plaintiff in the cultivation of crops which were to be partly his own, and was not done upon the credit of Towne, or with any expectation of charging it against him. Such undoubtedly was the understanding of the parties originally. But as Towne saw fit to say that the special contract was not binding upon him, it can not be set up by his executor as binding upon the plaintiff. *King* v. *Welcome*, 5 Gray, 41. It can not be treated as a nullity for one purpose, and as a contract for another."

The subsequent remarks of the court still further demonstrate the inconsistency between the repudiation of the contract by the defendant and his then insisting upon the payment for the first year's work as a payment under the contract. It was held, on the contrary, that the whole transaction, in the absence of a valid express contract, must be treated as the usual contract implied by the law from rendition of services, or delivery of goods at the request of another,—that is to pay what the services, or goods, were reasonably worth.

Defense of Accord and Satisfaction.

The Court of Claims says (rec. p. 15), "It must be acknowledged that this case belongs to that class which has been termed by many courts 'hard cases,'" etc. Were it not for the defense of accord and satisfaction, set up by the government, the decision below would probably have been favorable to the claimant. The ruling of the learned

court below on this point is contained in the following paragraph from its opinion (rec. p. 15):

"As to the right of the claimant to recover, irrespective of the express contract, what the hay was actually worth at the time and place of delivery, the court is again constrained to hold that the claimant can not recover. It is true that, under the authority cited, a party whose contract is for this statutory reason invalid and void may recover in *quantum meruit;* and it is true that, where there is an express valid contract, payment by a debtor of a part of his debt is not satisfaction of the whole, even though a receipt in full be given. (*United States* v. *Bostwick*, 94 U. S. R. 53.) But nevertheless it has been uniformly held by this court since *Kirkham & Brown*, (4 C. Cls. R. 223) that in cases of implied contract where the recovery will be in *quantum meruit* and the price to be paid is undetermined by agreement, where the defendant has paid and the contractor has accepted a price as payment in full, it closes the transaction, and the contractor can not come in and be allowed to allege that his goods were worth more than the price which he consented to take for them. (*Comstock's case*, 9 C. Cls. R. 141.) Acceptance of a smaller sum than the one claimed does not leave the defendants open to further claim, if the acceptance of the smaller sum was voluntary, without intimidation, and with full knowledge of all the circumstances. (*Savage* v. *United States*, 92 U. S. R. 382.)"

Material Facts Grouped.

This decision is evidently based upon the facts contained in the last two sentences of Finding IV (foot of p. 11), reading as follows (we number them for greater clearness of presentation as distinct paragraphs):

1. "The claimant while objecting did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in Finding I.

2. "Full payment was made by the defendants accord-

ing to the terms of the aforesaid agreement and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made."

But these findings must be read in connection with others which we quote (paragraphing and numbering them in like manner):

3. "Upon the receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments." (Finding III, p. 8.)

4. "The claimant before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery" (p. 11).

5. "Payments were always held back from the claimant by the quartermaster and an amount due to claimant was always in the hands of the quartermaster as security to compel it to deliver as required" (p. 11).

6. "The claim was submitted to the quartermaster general, under date of May 11, 1899." (Finding VI, p. 12.)

7. "And the depot quartermaster reported thereon, under date of June 28, 1899, as follows:

"It would seem but just that this firm's claim should be approved, after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them.'"

8. "And again, at a later date, as follows:

"'Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors'" (top of p. 13).

9. "The claim, however, was not allowed on the ground that it was one for unliquidated damages, of which the accounting officers have no jurisdiction." (Finding VI, p. 13.)

10. "The last payment was received by the claimant from the United States, July 24, 1899." (End of Finding V, p. 12.)

No Accord and Satisfaction.

When these statements are compared with one another by dates it clearly appears that there is no room for the operation of a defense of accord and satisfaction. The claimant, at the earliest moment at which it could be in any way damnified by the action of the officers of the Government—August 28, 1898—protested against the stoppage of shipments. When, on the 12th of September, there was a resumption of orders, the claimant notified the depot quartermaster that increased cost would be thrown upon it if compelled to deliver. This was a sufficient notification that it would expect payment of the increased cost by the Government. Business men are not to be held to the technical accuracy of a special pleader. It is enough that they in good faith keep those with whom they are dealing informed of their position. The "full payment" "accepted by the claimant without protest or reservation," found by the court (par. 2, *ante*, pp. 18, 19), must be read in the light of the previous protests of August 28 and September 12. Moreover, this finding is materially qualified, if not overthrown, by the particulars also found by the court. In truth, the claimant at no time received or accepted payment in full for all goods delivered to the date of payment. The quartermaster not only held back payments but held them, as expressly found, for the purpose of compelling the claimant to deliver as required. True, the claimant having on June 13, 1899, made its last delivery, did, on July 24, 1899, receive the last payment from the United States. But a month before the last delivery was made and two months and a half before the date of the last

payment, the claimant, May 11, 1899, submitted its claim through the depot quartermaster to the Quartermaster-General. The letter making the claim states that the writer had had a personal interview with Col. C. P. Miller of the Quartermaster-General's office, at Washington, who had notified the company to file its claim. In this letter the claimant company placed itself upon record as claiming reimbursement for its increased expenses (record, p. 12).

The depot quartermaster reported in favor of the approval of the claim, provided it were shown that it was based on increased cost of hay (record, foot p. 12). At a later date, probably in response to a call by his official superiors for a further report, he admitted that "undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors" (top p. 13). And the disallowance of the claim was based only on the ground that the accounting officers had no jurisdiction to allow a claim for unliquidated damages (last sentence of finding, p. 13). This is in accordance with the uniform current of decision. (5 Decisions Comp. Treas. 770, where numerous authorities are cited.)

It was under these conditions that the final payment was made on the 24th of July, 1899. This was the first date upon which any payment, which, upon any theory, was a full payment, was ever made.

The authorities concur in holding that to sustain the defense of accord and satisfaction there must be both an accord and a satisfaction; that is, that there must be an agreement—express or implied—to receive a certain sum in satisfaction of a claim, coupled with payment of that sum. Thus, in *City of Memphis* v. *Brown* (20 Wall. 289), it is said (p. 309): "In 1 Smith's Leading Cases it is said: 'The accord must be executed, and a mere executory agreement can never be pleaded as an accord and satisfaction.'

Again: 'If part of the consideration agreed on be not paid the whole accord fails.'" The authority referred to by the court, *Cumber* v. *Wane* (1 Smith's Leading Cases, 7 Amer. ed. 595, with notes, pp. 604–611), states the rule very fully. To the same effect is *Flockton* v. *Hall*, 14 Q. B. (Adolphus & Ellis, N. S.) 380; *Hall* v. *Flockton*, 16 Q. B. (Adolphus & Ellis, N. S.) 1039.

Such a defense can not be sustained in this case. Even if the deliveries at the demand of the government, coupled with part payment, be regarded as an accord, they were not accompanied by satisfaction. If the full payment, at what may be called the contract rate, on July 24, 1899, might, under different circumstances, operate as a satisfaction, there was no accord, for at that date the claimant was actively engaged in pressing a claim for reimbursement of the cost of its goods, and the refusal to allow that claim was not based upon a denial of its merits but upon a want of jurisdiction to allow it. On neither side was there any understanding that either the partial payments made during the deliveries or the final payment of July 24, 1899, were to close the transaction. The account was an open one throughout. It remains to-day an unsettled claim, free for examination on its merits.

Court of Claims Authorities Examined.

The paragraph of the opinion of the Court of Claims (rec. p. 15), hereinbefore quoted (*ante*, p. 18) as containing the gist of the decision that the action of the claimant in accepting payment constitutes an accord and satisfaction, barring them from making any further claim, contains a citation of four authorities, two in this court and two in the Court of Claims. These we now briefly examine.

In *United States* v. *Bostwick* (94 U. S. 53), cited by the Court of Claims (rec. p. 15), it was held that an agreement

by the government to pay rent at the rate of $500 a month was not satisfied by the payment of $250 a month, even though the receipts were signed, "in full of the above account" (94 U. S. top of p. 56). On this the court said (p. 67): "Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration. It is not found that there was any new consideration in this case. All that appears is, that an account was made out for the rent from July 1 to September 30, at the new rate, and that this account was receipted by Mr. Lovett after payment."

In response to this principle the court cites its own decision in the case of *Kirkham* v. *United States* (4 C. Cls. 223). But there it was said (p. 226): "This amount is paid by the United States and received by the claimants, and who at the time signed a receipt and acquittance in full of the vouchers. There is no evidence that there was any duress, or undue influence brought to bear on these claimants to compel or induce them to sign these receipts; nor that they protested or even objected at the time to the deductions then made."

How different from this case, where the record bristles with protests and objections, where there never was even a partial settlement to date, and where the final payment was made in the face of a claim for a larger amount recommended by the local quartermaster as just, and not denied by the department at Washington, but dismissed solely for want of jurisdiction.

Comstock v. *United States* (9 C. Cls. 141) goes somewhat further than the *Kirkham case*. In a learned opinion by the same distinguished judge, who, nearly thirty years later, delivered the opinion in this case, it is held (par. 2 of syllabus, p. 142):

"Where property is taken for the public use by impressment, so that there is no express contract or stipu-

lated consideration, and payment therefor is made at a less price than the owner demands, which payment is intended by the officers of the Government as payment in full, and is accepted by the owner without objection, protest, or reservation, though no receipt in full is given by him, he is concluded from seeking the balance of his demand."

Again, how different from the present case. No payment was ever made, even on pretense of being in full, until the 24th of July, 1899, when a final payment was made at the price named in the proposal, but, in the face of repeated objections and protests and of a formal claim by the contractors, and with a concession of the quartermaster that the claim was just, and a ruling of the accounting officers that they had no jurisdiction to consider on its merits a claim for any more.

Finally the court cites *Savage* v. *United States* (92 U. S. 382). Here the holder of Treasury notes, redeemable on presentation, surrendered them and received paper currency. Claiming that they should have been paid in gold, he afterwards brought suit for the difference in value. It was held that, as the surrender of the notes was a prerequisite to receiving anything in exchange for them, the acceptance of currency was inconsistent with a subsequent claim for gold. Nothing in this case in any manner touches the present claim.

Authorities Quoted in Response.

This case is governed by the principles asserted in the decision in *Piatt's Administrator* v. *United States* (22 Wall. 496). There a contractor had a contract in writing with the United States; but that contract was varied by a parol agreement with the Secretary of War for a larger amount. Congress passed a private act for his relief, limiting the amount allowable to the amount of a counterclaim which

the government asserted against him. The case having been adjusted on this basis, his administrators brought an action against the government for the balance remaining due on the verbal contract. It was held that he was neither limited to the prices named in the written contract nor concluded by the settlement made under the act of Congress. This court allowed him the full value of all the supplies furnished, in accordance with the oral agreement with the Secretary of War.

The case is much better and more fully reported in 10 C. Cls. 163, than in Wallace. The concluding portion of the opinion (22 Wall. 509, 510) is fairly summarized in paragraph 4 of the syllabus, 10 C. Cls. 164:

"Where a party voluntarily accepts the amount awarded him by a commission possessed of no judicial power, it is just to conclude that he acquiesces in the decision of the special tribunal which rejects a part of his claim as well as in the finding in his favor. But where the accounting officers of the Treasury are forbidden by law to allow a contractor anything beyond the amount of a crossclaim of the Government against him, manifestly he has no option."

The quartermaster, in the present case, never did pay the claimant in full, but constantly held back payments (p. 11, about two-thirds down the page). And though the claimant did receive a "last payment" July 24, 1899 (end of Finding V, p. 12), it was while a claim was pending for the reimbursement now claimed in this suit. The accounting officers held that they were without jurisdiction to allow this balance, being, as they held, for unliquidated damages (end of Finding VI, p. 13). Their decision not being on the merits and a simple denial of the claim for want of jurisdiction, there is no ground for holding it to be in the nature of an accord and satisfaction.

In *Fire Insurance Association* v. *Wickham* (141 U. S. 564),

it is held, in accordance with the decision in *Baird* v. *United States* (96 U. S. 430, 431): "In such cases the question is, whether the payment was in fact made and accepted in satisfaction." (141 U. S. 577.)

In *Chicago and Northwestern Railway Company* v. *United States*, and *Chicago, Milwaukee, and St. Paul Railway Company* v. *United States* (104 U. S. 680, 687), railroad companies performed services for the government in the transportation of mails. They had a contract fixing certain rates for that transportation, but these rates were reduced by statute, of which a notice was given them by the Postmaster-General. In one of the cases the claimants continued, after the statute and notice, to render the service and received the reduced compensation without protest. The Court of Claims, under these circumstances, held, *Chicago, Milwaukee and St. Paul Railway Company* (14 C. Cls. 125, 144):

"The statutory directions to the Postmaster-General were also a notice to the claimants that the service would be discontinued under the old rates, and would be continued, if at all, under the new rates. After this notice the claimants were at liberty to stop carrying the mails; in which case the defendants would have been obliged either to continue to pay the old rates or to terminate the contract and pay the month's extra pay. The claimants, however, made no objection to the notice contained in the statute; and, so far as appears in this case, continued to render the service under the new law without dissent or protest. We must presume that they acquiesced in its provisions and accepted the change which it made in their contract."

In the other case a protest was made but it was held to be unavailing, *Chicago and Northwestern Railway Company* v. *United States* (15 C. Cls. 232, 245).

This court, however, reversed the judgments in both cases. It held (104 U. S. 686), "the performance by the

company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, can not be construed as a waiver of its rights or an acquiescence in new proposals; and that whether it had protested against the erroneous construction of the law or not."

And again (p. 687), "here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and can not, therefore, be a bar to either."

Still more in point is the case of *Swift Company* v. *United States* (105 U. S. 691; 111 U. S. 22). This was a case of purchases of internal revenue stamps and the litigation arose out of a difference of opinion between the purchaser of the stamps and the Internal Revenue Office as to the mode of calculating the commissions. Among other defenses it was insisted that there had been an acquiescence of the claimant as well as of all similar dealers. But it was held by this court that where the business was conducted upon the footing of a running account the claimant could not be barred of his statutory rights by anything short of an actual settlement upon some other basis. The following remarks of the opinion when the case first came before this court are largely applicable to the transactions involved in the present claim (105 U. S. 695, 696):

"The case made by the petition is not that of successive and independent purchases of stamps, settled for, at the time, when the commissions given by the law were paid by the commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps; and new dealings, of the same character, but separate as to each instance, had, afterwards, upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account.

Money was paid on account of stamps furnished or to be furnished, in sums, differing in amount, but not less in any case than $500; and stamps were supplied in varying quantities, as ordered, without reference to corresponding and equivalent payments of cash; a bond with satisfactory security in pursuance of law, having been given and accepted, to secure the government against loss, in consequence of purchases on credit. The dealing is, undoubtedly, evidence that the appellant was willing to purchase stamps, to be paid for by a credit on account, in lieu of cash for commissions; but it does not prove that he was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts, from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding."

And in the subsequent decision (111 U. S. 22), it was held that the claimant was not barred of its rights, although the remittances made to it by the Internal Revenue Office were based upon a statement of account made out according to the theory of the Treasury Department, which statement the claimant received and under which he accepted payment without formal protest.

The decision in that case goes much further than is required to warrant a decision in favor of the claimant in the present case, where there were protests throughout the entire transaction against the basis upon which the Government was dealing with the claimant company. When the claimant was called upon, especially in time of war, to furnish goods to an authorized officer of the United States for the actual use of troops in the field, it would have incurred, at least, serious moral responsibility if it had failed to comply with the demand. The conduct of the officers of the claimant company, in supplying the goods whenever called for, was creditable to them as citizens and deprived them of none of their legal rights.

In the case of *Cape Ann Granite Co.* v. *United States* (20 C. Cls. 1) the Court of Claims took occasion to define the legal effect of a receipt in full accompanied or preceded by a protest. It said, in language fully applicable to the facts of this case (pp. 14, 15):

"A receipt in full is not binding as such simply because it recites that it is in full. It is open to contradiction according to the fact. It has no force as a contract, and is inoperative to bind the parties, unless it is based upon an agreement, compromise, or settlement with a complete understanding. At the time the receipt was given the protest was accepted by the agent of the Government without objection, the president of the company asserting, beyond the protest, that there were other claims, to wit, as to measurement, which were not included in the receipt. Neither party to the transaction of giving and accepting the receipt understood it as a settlement of differences as to measurement. The protest was afterwards changed by the claimant, by the consent of the defendants, so as to preserve the identity between the receipt and protest. We do not regard the fact that the receipt was sent by one officer of the Government and delivered by another as sufficient to change the law applicable to such transactions.

"Construing the receipt and protest as one transaction in fact and in law, and finding no evidence that any settlement took place between the parties, we must hold that the receipt is inoperative as an estoppel against the right of the claimant to have its claim examined in this court."

The Gibbons, Salomon, and Clark Cases.

In the court below the case of *Gibbons* v. *United States* (8 Wall. 269) was earnestly pressed by the learned Assistant Attorney-General upon the attention of the court. There there was a valid, express contract for oats. After the time for delivery under that contract had expired the quartermaster in charge demanded a delivery, and, by pressure amounting to threats, enforced the demand.

The price of oats had risen by this time and it cost the claimant more to get the oats than he received for them. It was held that there was only one contract and that the attempt to hold the government for a higher price as under an implied contract was inconsistent with the express one.

The view that the government was liable as upon an implied contract for the reasonable value of the goods furnished was treated by this court at that time as an attempt to hold the government liable for a tort.

This view of the effect of the delivery of goods to an authorized officer of the government originated with the opinion of this court in that case. No trace of it appears in the opinion of the Court of Claims in the same case (2 C. Cls. 421), or in the argument for the United States as reported either in the Court of Claims or in this court. It also ended with that case. Five years later, the same learned justice—Miller—who delivered the opinion in the *Gibbons case* delivered the opinion in *Salomon* v. *United States* (19 Wall. 17), and held that a delivery made under analogous circumstances might be treated in the alternative, as either an extension of the term of the original contract or a new transaction, and that, in either event, the obligation of the government was to pay the value. The entire opinion as reported, 19 Wall. 19, 20, is as follows:

"Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the government received and took possession of the corn, and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

"The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter, accepting delivery of such

supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.

"And if this were not so, when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

Moreover, the *Gibbons case* was decided at a very early period, while the principles of the liability of the government were, as yet, quite unsettled. The opinion refers (8 Wall. 275) to "the absence of adjudged cases determining how far the government may be responsible on an implied assumpsit for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit."

Nine years later this court, in *Clark* v. *United States* (95 U. S. 539), decided that question, which was previously in doubt, and held the United States liable under an implied contract, where it had received a benefit from a transaction, even though in its origin unauthorized. Here again it may be noted that the learned author of the earlier opinion, Mr. Justice Miller, vigorously dissented (p. 544).

While, however, later decisions have qualified, if they have not overruled, *Gibbons* v. *United States*, it is to be noted that that case and this differ in one point which essentially distinguishes them. That is, that in the *Gibbons case* there was an express and valid contract for the delivery of the grain. That being the only contract in existence, the court held that all deliveries, even though at a date subsequent to the limit named in that contract, must be referred to it. In this case there was no valid

express contract. The claimant's right to anything rests upon an implied contract, which can only be for the reasonable value of the goods delivered. Hence the *Gibbons case* is not an authority for limiting the claimant to the value named in the original proposal and acceptance.

Time is of the Essence.

There is a special reason in the present case for giving the transaction of the parties, whether regarded in the light of an implied or of an express contract, a construction which will not limit the price of the hay to that named in the proposal and acceptance. The advertisement clearly contemplated an early delivery, and the depot quartermaster, who may be supposed to have had as thorough means of knowledge as any one, admits this to have been its true meaning. "Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors" (p. 13). Hay is an article varying greatly in price at different seasons of the year.

In *Hipwell* v. *Knight* (1 Younge & Collyer, Eq. Exch. 401, 416), Baron Alderson, after a general statement as to the cases in which time is or is not of the essence of the contract, concludes:

"If, therefore, the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock and of a reversion, are instances of this."

Accordingly, it was held (citing the case just quoted) by the Supreme Court of Illinois, that—

"It is true that, in general, time is not, unless so declared by the parties, of the essence of the contract; but

the rule has exceptions, as, if the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract." *Wilson* v. *Roots*, 119 Ill. 379, 392.

The specific case of hay came before the Supreme Court of Michigan (Cooley, J. being one of the members of the court), in *Coon* v. *Spaulding*, 47 Mich. 163. Here the contract sued on was dated September 25, 1879, and provided for delivery of hay "in a reasonable time after being pressed." The plaintiffs did not call for hay until November 22, 1879, when defendant refused to let them have it. Held that the delay was unreasonable and the contract could not be enforced.

See also *Cameron* v. *Wells*, 30 Vermont, 633; *Blydenburg* v. *Welsh*, Baldwin, 331, 338; s. c. 3 Federal Cases, No. 1583; *Carter* v. *Phillips*, 144 Mass. 100; s. c. 10 Northeastern Reporter, 500.

Construction Consistent With Good Faith.

In the case of a government contract there is a special ground for insisting upon a construction which is in accordance with good faith and which seeks no unconscionable advantage of the other party.

In *Scott* v. *United States* (12 Wall. 443), it was said (p. 445), "If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."

This principle was applied in *Hume* v. *United States*, (132 U. S. 406) to a contract to sell to the government a quantity of shucks at a price far beyond their real value. It was there said (p. 415): "The claimant by his replication insists that the price of sixty cents per pound for shucks 'was the price at which he intended to bid, and

that there was no mistake on his part in making out the bid.' This is an admission, when taken with the findings of fact, that he designed to commit the agents of the government to a contract 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other,' and is fatal to his recovery according to the letter of the contract."

Is not the same principle applicable where the Government seeks to take advantage of an unconscionable bargain with the citizen? And if one construction of a contract or transaction would render it reasonable, honest, and fair, and another would make it unreasonable, unfair, and oppressive, is it not the duty of the court to adopt the former and discard the latter? If the spirit of the decision in *Hume* v. *United States* is applied to this case the result can hardly be doubtful. The conclusion will be the same as that reached by the quartermaster, that "it would seem but just that this firm's claim should be approved," etc. The advertisement, proposal, and acceptance contemplated a speedy delivery, and that speedy delivery not having been required, and the government having ordered hay at a later date, it would be unconscionable to require the claimant to continue to furnish it after hay had risen to rates far beyond those which prevailed at the time the parties originally negotiated.

If hay had fallen in the market to the same extent that it in fact rose, could the claimant recover in the Court of Claims the contract price for these later deliveries? The decisions of this court in the *Scott* and *Hume* cases answer this question in the negative and would limit a recovery to the market value. Similarly is the claimant entitled to the market value when the price has risen instead of falling. There can not be one rule for the government and another for the citizen. *United States* v. *State Bank* (96 U. S. 30, 36).

Measure of Damages.

The hay delivered prior to September 12, 1898, cost the claimant $27,211.53. The difference between this cost and the amount received by the claimant for that hay is $1,607.37. This sum represents the excess of the amount received over the cost. On the other hand, the cost to the claimant of the hay delivered after the 12th of September, 1898, exceeded the price it received for the same by seven thousand eight hundred and sixty-nine dollars ($7,869). (Finding V, p. 12.)

We contend that the recovery should be for the entire excess of the cost of the hay delivered after September 12 over the price already received for the same, that is, for $7,869. On the other hand, counsel for the United States contended in the court below, and doubtless will here, that, in case of a recovery, there should be a deduction of the $1,607.37 on the hay first delivered. This contention would be well founded if the record showed in express terms or by any fair implication that the $1,607.37 was an excess over the real market value of the hay to the government at the time and place of its delivery. No such finding, however, is made. On the contrary, the implication is very strong that the price which the government has already paid for the hay first delivered is no more than its fair market value.

The record does not show exactly how many bids there were in answer to the advertisement of June 25, 1898. It only shows that "a number of bidders submitted proposals" (top of p. 6) and that the proposals were opened on the 11th of July following, in the presence of "a large number of bidders." The claimant was the successful bidder. It appears that at the time of the acceptance of the proposal the price named by the claimant was the lowest the government could get on a competition of bidders. This affords good evidence that it was the low-

est market price at that time. If there were any evidence to show that it was more than a fair market price at that time and for the period afterwards to the 28th of August, within which the government continued to call for hay, the government was entitled to show that fact and, on showing it, would be entitled to recover back any excess of payments over the market value.

The advertisement, proposal and acceptance did not reach the stage of a completed contract and the claimant during that period was entitled just the same as during the subsequent period to the market value of its goods, and it was entitled to nothing more. The price it was entitled to receive can be neither increased nor diminished by the void transaction which did not become a contract. But the government has shown no diminished value below the price it has actually paid. The $1,607.37 profit represents the *quantum meruit* of the personal services of the claimant.

There is no reason why the Government, in paying for the hay on a *quantum valebat* basis, should not pay for the services of these professional handlers of hay, who knew where to get the hay in the country; who collected it and delivered it to the United States authorities. If claimant had not done this, the Government would have been obliged to send men about the country to buy up hay,—men without the special knowledge of the officers of the claimant company,—and would probably have paid a higher rate for such service.

The Court of Claims, in *Monroe* v. *United States* (35 C. Cls. 199; affirmed, 184 U. S. 524), says (p. 207):

"In the contemplation of all parties who enter into express agreements it is supposed and understood that a reasonable profit shall be made by him who performs. It is a matter of judgment what a reasonable profit is, and there have been numerous cases before the court showing that from 10 to 25 per cent is regarded, prospectively, as

the range of profits which contractors hope or expect to make."

And in *Murphy* v. *United States* (13 C. Cls. 372) that court said (p. 380):

"The claimant is entitled to recover only the actual cost of the extra work and labor, with a reasonable commission for his trouble in superintending it. In the absence of evidence, we fix 10 per cent as such reasonable commission."

The excess received by claimant over the cost to it of the hay furnished up to August 27, 1898, which probably represents little more than actual expense of handling the goods, was $1,607.37 on goods which cost the claimant $27,211.53. This is about six (6) per cent on the cost of the goods, or hardly more than half the minimum declared in the *Monroe* and *Murphy* cases to constitute a fair profit. Further comment is unnecessary to demonstrate the inequitableness of requiring the claimant to set off this meager profit made on about half the transaction, against the actual cost of the other half of the goods, thus requiring the claimant to do business at actual cost, and depriving it of a profit which on the entire transaction would only amount to about three (3) per cent of the cost of the goods.

Conclusion.

For these reasons it is asked that the judgment of the Court of Claims be reversed and the case remanded to that court with directions to enter a judgment for the claimant for seven thousand eight hundred and sixty-nine dollars ($7,869.00).

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

FILE COPY.

Office, Supreme Court U. S.
FILED
MAR 9 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

ST. LOUIS HAY AND GRAIN COMPANY, appellant,
v.
THE UNITED STATES.

No. 305.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

ST. LOUIS HAY AND GRAIN COMPANY, appellant, v. THE UNITED STATES. } No. 305.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On June 25, 1898, the chief quartermaster of the United States Army at Camp Thomas, Ga., advertised for sealed proposals for supplying said camp with 9,000,000 pounds of hay. The advertisement also gave the following information respecting such proposals:

> Awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof, should the interest of the public service demand such change; that in case of change of the quantities required by increase or decrease,

notice of such change will be served on the bidder by the chief quartermaster; and, further, that if the troops shall be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction. * * *

Deliveries of supplies to begin within five days from date of award, and proceed at daily rates of at least one-sixtieth of amounts, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster or his authorized representative, free on board cars at Battlefield railroad station, Ga. (Rec., pp. 4 and 5.)

The claimant's written proposal to furnish said amount of hay, in accordance with said advertisement, at 61½ cents per 100 pounds, was accepted in writing, as follows:

HEADQUARTERS FIRST ARMY CORPS
AND CAMP GEORGE H. THOMAS,
CHIEF QUARTERMASTER'S OFFICE,
Chickamauga Park, Ga., July 12, 1898.

The ST. LOUIS HAY AND GRAIN COMPANY,
Saint Louis, Mo.

GENTLEMEN: Your proposal opened July 11, 1898, for supplying 9,000,000 pounds of baled hay at Battlefield, Ga., at 61½ cents per 100 pounds, is accepted.

Deliveries are to be made as prescribed in my circular to bidders of June 25 last, on which your proposal was based, and the hay must be of the quality stated in said circular, copy of which is inclosed herewith for your information and guidance.

The hay will be called for, inspected, received, and paid for by the depot quartermaster, Battlefield, Ga., at present Captain D. E. McCarthy, assistant quartermaster, U. S. Army, and all consignments should be made to him.

Very respectfully,

J. G. C. Lee,

Col. and Asst. Quartermaster Genl., U. S. A.,

Chief Quartermaster.

Thereafter the chief quartermaster stated to the president of the company that Capt. D. E. McCarthy, depot quartermaster, would do the ordering, and referred him to said Captain McCarthy for directions as to the exact amount that would be wanted daily. The president of the company thereupon called upon said Captain McCarthy, who gave him verbal orders to have not less than 8 nor more than 10 cars on the track daily. Eight car loads would amount to 160,000 pounds. (Rec., pp. 6–7.) At the time of the acceptance of the claimant's proposal there were about 12,000 animals at Chickamauga Park, but in August and September the camp was practically broken up. (Rec., p. 7 and p. 13.) Immediately thereafter the claimant made arrangements for the purchase of hay, mostly in the States of Indiana and Illinois, and its shipment direct to Chickamauga Park.

By the 27th of August, 1898, the claimant had delivered and the United States had accepted, pursuant to the foregoing agreement, 4,685,949 pounds of hay, or more than half the amount provided for in said agreement.

On the 28th of August Quartermaster McCarthy, above referred to, wired the claimant:

> Do not ship any more hay until notified to do so.

At that time the claimant was ready and willing to proceed with shipments at a rate practically identical with that at which it had been delivering the hay, in which event it would have completed the delivery of the entire 9,000,000 pounds by the close of September, 1898, at the price of its proposal, and sustained no loss. Upon receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments. The quartermaster, however, would at that time accept no more hay. (Rec., pp. 7 and 8.)

On the 12th of September, 1898, and at various dates thereafter to May, 1899, Quartermaster McCarthy at Chickamauga Park sent telegrams to claimant calling for the delivery of hay in various amounts. One such telegram on March 23 read:

> Only four days' hay on hand. Unless you supply me, will purchase in open market at your expense.

To these telegrams the claimants made replies at various times, beginning on December 2, 1898, and ending June 24, 1899, fifteen replies in all. In ten of these replies claimant made various references to shipments of hay on "our contract," and in the last of these (June 24, 1899,) claimant inquired of Quartermaster McCarthy:

> We would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up.

In several of these replies the claimant made different assurances of its desire and readiness to ship hay under their contract, and in none of them did it make any intimation of any intention to refuse or to protest against such shipments. (Rec., pp. 7, 8, 9, and 10.)

The total amount of hay thus delivered by the claimant subsequent to August 28, 1898, was 3,814,490 pounds, which, added to the amount delivered prior to said date, made 8,500,439 pounds, the last delivery being on June 13, 1899, and thereafter no more hay was called for by the United States nor delivered by the claimant. (Rec., pp. 10–11.)

Between the 28th of August, 1898, when shipments were stopped by the telegram of the quartermaster, and the month of June, 1899, when the last of the hay was delivered, hay rose in price to such an extent that the cost to the claimant of the hay delivered after such suspension was $7,869 more than the price paid for the same according to the agreement. (Rec., p. 11.) The cost of the hay delivered by the claimant under the agreement prior to such suspension of shipment, including the cost of the transportation of the same, was $1,607.37 less than the amount received for the same under such agreement. (Rec., p. 12.)

Payments were always held back from the claimant by the quartermaster, and an amount due to claimant

was always in the hands of the quartermaster as security to compel it to deliver as required.

The claimant, before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant, while objecting, did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in Finding I. Full payment was made by the defendants according to the terms of the aforesaid agreement, and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made. (Rec., p. 11.)

The last payment was received by the claimant on July 24, 1899. (Rec., p. 12.)

On May 11, 1899, the claimant submitted to the Quartermaster-General a claim against the United States "for $4,600, covering loss we sustained in filling our contract at Chickamauga National Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day, and all papers pertaining to our contract *is* attached." The statement of this claim went on to recite an interview with the

Quartermaster-General's Department, Washington, and set forth that the claimant had acted in good faith "in filling this contract against our verbal protest through the writer to you, that we were losing money, and that Government should not require us to complete contract. But you so advised us you would go into open market and buy for our account and charge us difference."

Respecting this claim, Quartermaster McCarthy reported to the Quartermaster-General, under date of June 28, 1899, as follows:

> It would seem but just that this firm's claim should be approved after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them.

And at a later date as follows:

> Undoubtedly deliveries were made for a longer period than contemplated when bids were made by the contractors.
>
> At that time there were about 12,000 animals at the camp at Chickamauga Park, but in August and September the camp was practically broken up.
>
> The contractors continued to supply us with hay until July, 1899, and in the meantime, especially during the winter months, hay had advanced in price, so that it seemed but just that some recompensation should be made to the contractors.

The claim, however, was not allowed by the accounting officers, on the ground that it was for unliquidated damages. (Rec., pp. 12–13.) There-

after suit was brought upon the claim in the Court of Claims.

The court held that the written agreement between the parties was invalid because not made in the form required by section 3744, Revised Statutes, but that there had been an accord and satisfaction between the parties which precluded the claimant from maintaining its claim on the *quantum meruit*, and dismissed the petition.

This appeal is from such judgment of dismissal.

SUMMARY.

In the foregoing statement all of the facts found by the Court of Claims are recited in substance, but the controlling facts upon which the judgment of the Court of Claims rests are briefly these:

In 1898, during the war between Spain and the United States, the claimant and the United States entered into a written agreement, contained in various writings, for the purchase and sale of 9,000,000 pounds of hay at the agreed price of 61½ cents per 100 pounds, to be delivered at a military camp of the United States in Georgia. This agreement contained the provision that the deliveries were to "proceed at daily rates of at least one-sixtieth of the amounts, or in such quantities and at such times afterwards as may be designated by the chief quartermaster or his authorized representative," and at the time the agreement was entered into it was mutually expected by the claimant and the officer representing the United States that the full amount of hay would

be substantially required for use at the camp within sixty days from the time of the beginning of delivery. Deliveries were begun by the claimant *shortly after the 12th of July, 1898,* and continued until August 27, when more than half of the agreed amount had been delivered, but on August 28 the quartermaster in charge, by reason of the fact that the camp was practically broken up, telegraphed the claimant to ship no more hay until notified to do so: to which stoppage of shipments the claimant protested both verbally and in writing. Nevertheless, deliveries were resumed on the 12th of September, at the demand of the quartermaster, at which time the period of sixty days had nearly expired, and were continued at various times to the 13th of June, 1899, at the request of the quartermaster, until the agreed amount was substantially delivered. All of such deliveries of hay were from the outset required by the quartermaster on behalf of the United States, and made by the claimant, pursuant to and in recognition of the binding force of the agreement between the parties; and full payment, according to the terms of the agreement, was made by the defendants and accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made, the last payment being received by claimant on July 24, 1899.

The claimant before proceeding to deliver hay, pursuant to the demands of the quartermaster, beginning on the 12th of September, 1898, informed him that increased cost would be thrown on it if compelled to

deliver, and requested to be relieved from so doing, but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant, while objecting, did not notify the depot quartermaster that it would demand damages for the losses sustained or would seek to recover a higher price for hay to be delivered than that expressed in the agreement.

The present claim was submitted in writing to the Quartermaster-General, under date of May 11, 1899, by the claimant, "for $4,600, covering loss we sustained in filling our contract at Chickamauga National Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day."

ARGUMENT.

The Court of Claims held, respecting the agreement or contract of the parties contained in the advertisement of the deputy quartermaster-general of the United States calling for proposals for forage and straw and the accompanying information furnished in connection therewith, the written bid of the claimant, and the acceptance in writing thereof by the assistant quartermaster-general, that—

> The agreement not being in writing and signed by the parties, as required by the Revised Statutes, section 3744, was not a valid contract upon which an action can be brought for damages caused by the defendant's breach.

The court thus held on the authority of the leading case of *Clark* v. *United States* (95 U. S., 359), in which it is declared that section 3744, Revised Statutes, is a

statute of frauds relating to the contracts with the United States specified therein. Indeed, the statute itself, when enacted, was entitled "An act to prevent and punish fraud on the part of officers entrusted with the making of contracts for the Government." (12 Stat. L., 411.)

Starting from this, the claimant contends on this appeal that it was entitled to wholly disregard the agreement which it entered into with the United States and to maintain a claim as upon an implied contract for the reasonable value of the hay delivered by it to the United States, because its agreement with the United States for the purchase and sale of said hay, although complete and definite and in writing, was not written out in formal manner and signed at the end thereof by both parties, according to the requirements of the special statute of frauds relating to such contracts. This position would be unassailable if it were not for one vital fact, namely, that the express agreement of the parties, although not enforceable as an executory contract, has nevertheless been fully executed on both sides by the delivery of the hay on the part of the claimant and the payment in full therefor at the agreed price, by the United States.

It is true that where services have been rendered or goods delivered under a contract within the statute of frauds, an action may be maintained on the *quantum meruit* as upon an implied contract, *but only where the defendant is in default.*

Where payments are made or services rendered upon a contract void by the statute of

> frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments or the value of the services in an action upon an implied assumpsit. But to entitle him to maintain such action he must show that the defendant is in default.
>
> *Galvin* v. *Prentiss*, 45 N. Y., 164.
> *Day* v. *Railroad Co.*, 51 N. Y., 583.
> *King* v. *Brown*, 2 Hill (N. Y.), 487.
> *Coughlin* v. *Knowles*, 7 Met., 61–62.

The case of *Clark* v. *United States* (95 U. S., 539), relied upon by the claimant, is entirely in harmony with this doctrine. In that case the claimant had entered into a parol contract with the United States which this court held to be invalid because not conforming to section 3744 Revised Statutes. This contract, however, had been executed on the part of the claimant, but the defendant had refused to make compensation, and accordingly this court held that the claimant was entitled to recover as upon an implied contract for a *quantum meruit* (p. 542). But there is no analogy between this case and the Clark case. In this case the parties entered into an agreement in writing which contained all the elements of a contract, but which was not binding upon nor enforceable by either party, because not made in comformity with the provisions of section 3744, Revised Statutes. It is clear, however, that both parties considered that they had entered into a valid contract, and that

they acted upon this view from the time that the agreement was entered into until the last delivery of hay by the claimant and the last payment therefor, according to the terms of the agreement, by the United States. Throughout this whole period of nearly a year the officer representing the Government at various times called upon claimant to make deliveries of hay as needed by him, and in every instance these requests were complied with by the claimant, upon the manifest understanding on its part that it was bound by such contract. On December 2, 1898, the claimant wrote to the defendant for "an order for some more hay on our contract;" on December 10, 14, and 29, claimant made similar communications to the quartermaster. On March 23, 1899, the quartermaster wired: "Only four days hay on hand. Unless you supply me will purchase in open market at your expense. This is the third and last call. Follow cars with wire, so there will be no delay;" to which claimant replied on the same date: "Need not worry. Hay on way. Will rush." At various other times thereafter, claimant, communicating with the quartermaster, made reference to *its contract*, and on May 1 assured the quartermaster that he need not go on the open market to purchase, as "We will have hay with you all the time." At one time during this period, to be sure, claimant protested to the quartermaster against the stoppage of shipments by the quartermaster, but this protest contained no intimation that the claimant did not consider itself bound by the contract. On the contrary, such protest contained within

itself an express recognition of the validity of the contract, for it consisted in the statement that increased cost would be thrown upon claimant if it were compelled to deliver at a time beyond the contemplated sixty days; but though thus objecting the claimant did not notify the depot quartermaster that it would demand damages for losses sustained or would seek to recover a higher price for hay to be delivered than that agreed upon. This protest or objection was not heeded by the quartermaster, who refused to release the claimant from the obligation to deliver which both parties supposed rested upon it, and thereupon, as above stated, the deliveries of hay were resumed and continued with express reference to the contract between the parties until, on June 24, 1899, the claimant inquired of the quartermaster, "Would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up," and was informed that no more hay would be called for. During the time that the claimant made deliveries of hay under the contract, payment was made from time to time at the agreed price, and in full on July 24, 1899. These payments were accepted by the claimant without protest or reservation at the time the vouchers were given or the payments made. Lastly, near the close of the period in which the deliveries of hay were made, when the claimant for the first time asserted any claim against the United States for anything beyond the agreed price for the hay, it was done in a statement, which explicitly recognized the validity and

binding force of the contract, asking compensation for—

> loss we sustained in filling our contract at Chickamauga National Park on hay on account of Government not taking hay according to their proposal of one-sixtieth per day, and all papers pertaining to our contract *is* attached. * * * . We have acted in good faith with you in filling this contract against our verbal protest through the writer to you that we were losing money and that Government should not require us to complete the contract.

It is very clear from the terms of this statement of their claim that the claimant recognized that it had delivered the hay pursuant to the contract and under the supposition that it was bound to do so, and that it had no thought at the time of asserting any other claim than for losses sustained through being compelled to complete the contract by delivering hay under it beyond the sixty days within which it had been contemplated, at the time the agreement was entered into, that full delivery would be required and made. Moreover, in the petition filed in this case in the Court of Claims, the claimant relied upon the "contract created between the parties" and asked for damages for its violation. (Rec., pp. 2–3.)

We have, then, a contract between the parties which came within a special statute of frauds relating to contracts with the United States, and which for that reason could not be enforced by either party, but a contract,

nevertheless, which each party supposed was valid and binding, and which has been fully executed on the part of the claimant by delivering all of the hay required by the United States, and on the part of the United States by paying therefor in full at the agreed price. So that nothing remains to be done by either party, nor is either party in default respecting such contract. Under these circumstances an action can not be maintained as upon an implied contract by either party, for the reason that the express contract constitutes a perfect defense to such action, despite the fact that at the time it was entered into it was invalid as an executory contract.

> The courts have not treated these contracts [within the statute of frauds] as absolutely void. When fully executed they define and measure the rights of the parties thereto, and if this contract had been fully executed and the plaintiff had earned the price stipulated and had then brought *quantum meruit* on the grounds that the services were reasonably worth more, the contract so executed would have been a full answer. (*Stone* v. *Dennison*, 13 Pick., 1.)
>
> *King* v. *Welcome*, 5 Gray (Mass.), 44.

In the case of *Stone* v. *Dennison*, cited above in *King* v. *Welcome*, the plaintiff, who was a minor, entered into a contract with the defendant to work for him until he should attain his majority, in consideration of the furnishing to him by the defendant of his board, clothing, and education. This contract was fully executed on both sides; but after he became of age the plaintiff sued

the defendant on a *quantum meruit* to recover a greater compensation than that already received for his services. The defendant pleaded in defense the express contract. The court held that the defense was good, and that the action could not be maintained, because the contract, although within the statute of frauds, had been fully performed on both sides, saying:

> The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a *quantum meruit* as upon an implied contract. But the statute does not make such a contract void. * * * Where a contract has been in effect performed, the rights, duties, and obligations of the parties resulting from such a performance stand unaffected by the statute.

See also—

Gillespie v. *Battle*, 15 Ala., 276.
Williams v. *Beemis*, 108 Mass., 91.

Indeed, it is a well-settled principle that the statute of frauds has no application to an executed agreement.

Remington v. *Palmer*, 62 N. Y., 31.
Larson v. *Johnson*, 78 Wis., 306.
House v. *Bernheim*, 59 Conn., 133.

> The parol agreement being executed, therefore, neither of the parties can afterwards object that the contract was within the statute of frauds. Where a contract, which when made was within the statute of frauds and might have been voided thereby, has been fully executed, the statute furnishes no defense.
>
> *McCue* v. *Smith et al.*, 9 Minn., 258.

> If they [the contracts within the statute of frauds] be fulfilled and executed, they are just as valid as though they had been in writing. * * * The statute operates on a contract *only when it is executory.* It does not make a performance of such contracts unlawful. Hence a party may always defend under such a contract when sued for any act done under it. *Webster* v. *Lecompte*, 74 Md., 258–9, citing *Crane* v. *Gough*, 4 Md., 333.

Finally the same rule of law has been announced by this court in *Bibb* v. *Allen* (149 U. S., 497), as follows:

> It is well settled by the authorities that the defense of the statute of frauds can not be set up against an executed contract. (*Dodge* v. *Crandall*, 30 N. Y., 294, 304; *Brown* v. *Farmers' Loan and Trust Co.*, 117 N. Y., 266, 273; *Madden* v. *Floyd*, 69 Alabama, 221, 225; *Gordon, Rankin & Co.* v. *Tweedy*, 71 Alabama, 202, 214; *Huntley* v. *Huntley*, 114 U. S., 394, 400; Browne on Stat. of Frauds, sec. 116.) This rule proceeds and rests upon the principle that there is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally, bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action." (*Newman* v. *Nellis*, 97 N. Y., 285, 291.)

In the light of the foregoing authorities and upon the undeniable facts in this case, the decision of the

Court of Claims in this case that the claimant is precluded from maintaining this action by an accord and satisfaction seems to be fully warranted. It is not contended, of course, that there has been any accord and satisfaction respecting the present claim, but only that the present claim can not be maintained because of the complete execution of the express contract of the parties and the accord and satisfaction in relation thereto.

Counsel for claimant seem to labor under the impression that, in setting up the executed express contract of the parties as a defense to the present action upon an implied contract, while conceding that that contract was within the statute of frauds and nonenforceable, we are playing fast and loose with that contract, treating it as a nullity for one purpose and setting it up as a defense for another; but this is a clear misapprehension of our position. Nor does the cited case of *Williams* v. *Beemis* (108 Mass., 91) support any such view. On the contrary, we have relied in this argument upon that very case to support the proposition that an action can not be maintained as upon an implied contract where there is an existing express contract between the parties, invalid because within the statute of frauds, *unless the defendant is in default.* (See p. 17 of this brief.) That we are warranted in such reliance would seem to appear with sufficient clearness from the decision itself (pp. 92–93):

> An action for money had and received lies to recover back money paid by a party to an agreement which is invalid by the statute of

> frauds, and which the other party refuses to perform. * * * "The true principle is this: The contract being void and incapable of enforcement in a court of law" (the defendant having refused to perform it), "the party paying the money or rendering the services in pursuance thereof may treat it as a nullity and recover the money or value of the services under the common counts." (*King* v. *Brown*, 2 Hill, 485–487, per Nelson, C. J.)

THE CLAIM AS ORIGINALLY PRESENTED.

There is another light in which to view this claim, albeit not presented by counsel for claimants on this appeal, and that is the form in which the claim itself was first presented by the claimant through its statement filed with the quartermaster on May 11, 1899, in which compensation was asked "for loss we sustained in filling our contract at Chickamauga National Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day," and later in the petition in this case. But the claim as thus presented seems to be without foundation from any point of view. To begin with, as stated in the opinion of the Court of Claims (Rec., p. 14), it is not at all clear that the Government was bound by the terms of the contract to accept full delivery of the hay within sixty days, for the provision in the contract that deliveries were to "proceed at daily rates of at least one-sixtieth of the amount" is very materially qualified by the following phrase "or in such quantities and at such times afterwards as may be designated by the chief quartermaster

or his authorized representative." The interpretation placed upon this part of the contract by the quartermaster was that it gave him authority to order hay in such quantities as he desired, and in this view the claimant, under the supposition that the contract was valid and binding, acquiesced, although protesting and reluctantly, by acceding to the various demands of the quartermaster for deliveries of hay made by him after the period of sixty days had expired. In so doing the claimant certainly waived whatever rights he may have had under this clause of the contract, and brought himself within the rule laid down in *Gibbons* v. *United States* (2 C. Cls. R., 421; 8 Wall., 269), in which case, upon a state of facts practically identical with the facts in this case, the Court of Claims said:

> The Government could not compel the delivery of the oats, which were the subject of the contract, after its right to demand them had ceased, and this the claimant should have known; hence, he can not recover the difference in price between that named in the contract and that ruling in market after its expiration, for the oats subsequently delivered under the assumed compulsory power of the quartermaster.

This view was sustained on appeal by this court in the following language:

> It is very clear that but one contract was ever made in this case, and that the plaintiff was absolved from this by the refusal of the quartermaster to receive the oats when tendered but from whatever motive he may afterwards

> have consented to renew that agreement and proceed to its fulfillment, its terms were the same. * * * The quartermaster treated the contract as still in force, and his demand on the plaintiff was made under that idea. In this he was wrong, but the plaintiff had his option to concur in this view and deliver the balance of the oats or to refuse to deliver any more. * * * That he feared the officer might buy the oats in market and hold the difference in the price from the money due for oats already delivered [*this was exactly the situation in the present case*] does not invalidate the contract which he consented to fulfill to avoid that result.

But finally, of course, the claimant could not enforce such a claim, because to do so would be an attempt to enforce a contract which it is conceded is invalid as an executory contract.

EQUITIES OF THE CLAIM.

Much stress is placed on this appeal upon the following remark in the opinion of the court below:

> It must be acknowledged that this case belongs to that class which has been termed by many courts "hard cases," and that the hardness of it was caused by officers of the Government neglecting their statutory duty (R. S., 3746), and that the claimant, being ignorant of the law, might well rely upon the officers of the Government to reduce the contract to legal form.

But a complete answer to this comment is to be found in the Gibbons case, above cited; for if the contract had been put in legal form, as required by section

3744, the claimant would, under the rule laid down in the Gibbons case, be without remedy, even conceding that by the terms of the contract it was not bound to make delivery of hay after the period of sixty days had elapsed; for the deliveries made by it after that period would, upon the authority of the Gibbons case, have been made under the contract.

As to the *justice* of the claim, without respect to its legal status, it may be fairly said that the claimant took its chances of the possibility that the full amount of hay would not be required during the sixty days, but that exactly the contingency that did occur might occur—that the camp would be broken up and the delivery of hay interrupted and prolonged thereby. And by way of illustration: Suppose that the price of hay instead of increasing had decreased, and that the hay had been delivered and paid for at the contract price, as in the present instance; what sort of standing would a claim on the part of the United States possess, for repayment by the claimant to the United States of the difference between the agreed price paid and the market value of the hay? And yet the analogy between such a claim and the claim under consideration seems to be very close.

However viewed, the judgment of the Court of Claims seems to be well grounded.

LOUIS A. PRADT,
Assistant Attorney-General.

Supreme Court of the United States.

No. 41.—October Term, 1903.

St. Louis Hay and Grain Company, Appellant, vs. The United States. } Appeal from the Court of Claims.

[November 16, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition. 37 C. Cls. 281. The petition alleges a contract by the United States to buy 9,000,000 pounds of hay from the claimant at the rate of sixty-one and one-half cents per hundred weight, a refusal by the Government to take the hay at the rate of one-sixtieth daily, as required by the contract according to the claimant's interpretation, and a failure to accept two hundred and fifty-five thousand two hundred and ninety-one pounds out of the nine million. The rest, it is admitted, was taken and paid for at contract rates. The claimant seeks compensation for an increased price paid by it, increased cost of transportation and loss of anticipated profits, caused by the delay, all as damages for the breach of the contract, or, alternatively, the market value of the hay less the amount paid by the United States. The answer is a general denial.

The Court of Claims finds that during the late war with Spain an advertisement was published by a quartermaster for 9,000,000 pounds of hay, among other things, seemingly for use in Camp George H. Thomas, Georgia, and that in connection with it the following information was furnished: "The foregoing are the estimated quantities which will be required, but bids will be accepted in whole or in part . . . and awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding twenty per centum thereof . . . and further, that if the troops should be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction. . . . Hay and straw. . . . Deliveries of the supplies to begin within five days from date of award, and proceed at daily rates of at least one-sixtieth of amount, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster," &c. A bargain was made on these terms on July 12, 1898. Shipments were made, amounting, on August 27, 1898, to 4,685,949 pounds. On August 28 the quartermaster telegraphed to the claimant not to ship any more

hay until notified to do so. This suspension of orders was due to the withdrawal of troops. The claimant then had 100 carloads in transit, which it was obliged to sell for what it could get, and protested against the stoppage. At different dates between September 12 and May 18 following the quartermaster telegraphed orders for hay, which were filled. Hay meantime had risen in value and cost the claimant more than it would have cost in the summer. Accordingly the claimant asked to be relieved from delivery, but the quartermaster refused, holding back money due to the claimant as security to compel performance. The claimant went on with deliveries, and in December was asking for orders "on our contract," on April 27 returned a voucher "covering hay on our contract," on May 27 sent a bill of lading and invoice "ordered upon our contract to day," and on June 24, 1899, wrote "we would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up." It would seem that no hay was ordered after June 13. The claimant delivered the hay and received full payment for it under the contract, without protest or attempt to reserve any rights at that time. The last payment was made on July 24, 1899. On May 11, 1899, however, the claimant wrote to the quartermaster, claiming damages on account of the government not taking the hay at the rate of one-sixtieth per day and on June 28, and later, the quartermaster approved the claim. — Although, no doubt, both parties supposed their agreement binding, the Court of Claims held, and it is not disputed, that the contract was within Rev. Stat. § 3744, and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed. *Clark* v. *United States*, 95 U. S. 539; *South Boston Iron Company* v. *United States*, 118 U. S. 37. See *Monroe* v. *United States*, 184 U. S. 524. It is argued by the claimant on this ground that it is entitled to maintain a *quantum valebat*.

On the facts stated it is evident that the claimant has no case. The invalidity of the contract is immaterial after it has been performed. When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid while executory; the transfer cannot be revoked or the terms changed. A promise to make a gift does not bind, but a gift cannot be taken back, and a transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange. The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods. See *Savage* v. *United States*, 92 U. S. 382. The proposition does not need to be argued or explained more at length. Of course, different considerations would come in if the claimant had been subjected to a motive from which it had a right to be free, as, for instance, by fraud or duress. But there was nothing which the law could

recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the Government to see that the contract was put in binding form, is very far from making out an analogy to fraud. The claimant was bound to know the law at its peril. The agent of the United States made no representation, and the claimant in no way purported to submit its judgment to his, if that would have bettered its case.

But it is said that this is not the simple case of mutual performance of a void contract, but that the United States, although it has paid the price, has broken the contract in respect of time. It may be said that if the United States, instead of paying for the hay, had set up the invalidity of the contract, the claimant could have sued on a *quantum valebat*. *Clark* v. *United States*, 95 U. S. 539, 542, 543; *Bacon* v. *Parker*, 137 Mass. 309, 310, 311. And it might be argued that the same result would follow if the United States, after paying the price, were compelled to rely upon the invalidity of the contract in answer to a claim of damages for a breach. Acceptance of payment by the vendor is not necessarily a waiver of such a claim. *Garfield & Proctor Iron Co.* v. *Fitchburg Railroad*, 166 Mass. 119, 123. But we need not consider the questions suggested, because we agree with the Court of Claims that there was no breach. The right to diminish the order and to change the quantities and times was reserved in the fullest and most express terms, and especially with regard to the event which happened, the withdrawal of the troops. Therefore, if, in view of the protest and claim made by the claimant, we should assume that the payment of the contract price did not purport to be in full satisfaction of all claims under the contract, which would be going very far and would be against the findings, still there is no valid claim under it, because the United States has done all that it undertook to do. It is true that hay is an article varying greatly in price at different seasons of the year, and that would have been a reason for holding time of the essence, if the contract had fixed a time; but the contract left the time open, as we have said, and the claimant must be held to the bargain which it made, although it has been disappointed in reasonable hopes.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S